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CANADIAN 3576 CRIMINAL CASES ANNOTATED.

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the Provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

EDITED BY
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CASES REPORTED, VOL. VI.

- AH YIN, R. v. (No. 1).** (B.C.)
Appeal from summary conviction—Requisites of notice of appeal—Describing the offence—Playing in common gaming house—Looking on in common gaming house—Cr. Code secs. 199, 880, 982—Code form NNN. 63
- AH YIN, R. v. (No. 2).** (B.C.)
Appeal from summary conviction—Entry and prosecution—Dismissal as not lodged in due form—Jurisdiction as to costs—Cr. Code secs. 881, 883, 884. 66
- ANONYMOUS CASE (H— v. H—).** (QUE.)
Vagrancy—Non-support of wife—"Wilfully refusing or neglecting to maintain"—Reasonable ground for believing that liability had terminated—Wife living in adultery pending her action for separation—Cr. Code sec. 207 (b). 163
- ATTORNEY-GENERAL v. SCULLY (No. 1).** (ONT.)
Court of General Sessions—Records—Custody of by clerk of the peace—Public documents—Inspection—Right of accused to demand certified record of acquittal—Fiat of Attorney-General unnecessary—Mandamus—Action for malicious prosecution—Evidence—46 Edw. III.—Cr. Code, secs. 654, 726. 167
- ATTORNEY-GENERAL v. SCULLY (No. 2).** (CAN.)
Leave to appeal to Supreme Court of Canada—Special leave only upon special grounds other than error—Control by provincial courts of court records—Exemplification of proceedings in criminal prosecution—Mandamus to clerk of the peace—Cr. Code secs. 654, 726. 381

BASKETT, R. v.

(ONT.)

Evidence under commission—Witness resident out of Canada but temporarily therein—Application by accused—Proof that evidence material—Cr. Code sec. 683. 61

BEAGAN, R. v. (No. 1).

(N.S.)

Summary conviction—Certiorari—Adjudication on facts involving the merits, conclusive—General jurisdiction over subject matter—Collateral facts—Canada Temperance Act—Cr. Code secs. 889, 890. 54

BEAGAN, R. v. (No. 2).

(N.S.)

Summary conviction—Fine—Distress and imprisonment in default—Costs of distress and of conveying to gaol—Non-inclusion in minute of adjudication—Variance between the minute and the conviction—Cr. Code sec. 872 (a)—Code forms WW and FFF. 56

BELANGER, R. v.

(QUE.)

Grand Jury—Procedure on swearing in the grand jurors—All jurors to be impanelled when foreman sworn—Bill of indictment—Initialling witnesses' names endorsed, when sworn—Depositions at preliminary enquiry—Use of before grand jury—Motion to quash indictment—Cr. Code secs. 645, 656. 295

BENOIT, R. v.

(N.W.T.)

Grain shipment—Allotment of railway cars—Statutory regulations in Manitoba and N.W.T.—Manitoba Grain Act 1900 (Can.)—Discrimination by railway agent in favour of grain elevator companies—Canada Statutes, 2 Edw. VII. (1902), ch. 19, secs. 5 and 7—Summary conviction—Case stated—Cr. Code sec. 900. 351

BONGARD, IN RE.

(N.W.T.)

Extradition—Application for warrant of apprehension—Jurisdiction—Prerequisites—Laying information in extradition or proving foreign warrant of arrest—Alternative procedure—Foreign warrant must be in full force—Return of not found—Authenticated copy of foreign insufficient—Appearance under irregular warrant no waiver—Extradition Act, R.S.C. 1886, ch. 142, secs. 6, 9, 10.

74

BOWERS, R. v. (No. 1).

(N.S.)

Theft—Habeas corpus—Jurisdiction of County Court Judge in Nova Scotia—Acts of 1897, ch. 32, sec. 2—Costs against informant.

100

BOWERS, R. v. (No. 2).

(N.S.)

Summary trial—Theft over \$10—Plea of not guilty—Jurisdiction of city stipendiary magistrate—Cr. Code secs. 785, 789, 790.

264

BRENNAN, R. v.

(N.S.)

Unlawful possession of "still" or rectifying apparatus—Possession "in any place," meaning of—Inland Revenue Act, R.S.C. 1886, ch. 34—Stat. Canada 1897, ch. 19, sec. 6, and 1898, ch. 27, sec. 3.

29

BRINDLEY, R. v.

(N.S.)

Evidence—Corroboration—Allowing girl under 18 to be on premises for immoral purposes—Cr. Code secs. 187, 684.

196

CAHILL, R. v.

(N.B.)

Canada Temperance Act—Intoxicating liquor sent by express, c.o.d.—Passing of property—Delivery by express agent—Receipt of price.

204

CARLIN, R. v. (No. 1).

(QUE.)

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits—Admissibility of evidence—Judge's comment on prisoner's challenge of jurors—Irregularity tending to prejudice the jury—Character evidence—Instruction to jury—Alleged prejudice of a juror—Finding of the triers conclusive—Affidavits of jurors to prove arrangement between jurors that a majority should carry not admissible—Affidavits to support verdict admissible—Impeachment of verdict—Reserved case on questions of law—Grounds for new trial—Motion for leave to apply to Court of Appeal—Crim. Code secs. 394, 668, 677, 735, 743, 747.

365

CARLIN, R. v. (No. 2).

(QUE.)

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits—Admissibility of evidence—Judge's comment on prisoner's challenge of jurors—Character evidence—Instruction to jury—Alleged prejudice of a juror—Finding of the triers conclusive—Weight of evidence—Impeachment of verdict—Reserved case on questions of law—Grounds for new trial—Motion for leave to appeal—Question on which reserved case not asked—Crim. Code secs. 394, 668, 677, 735, 743, 744, 747.

507

CARRIERE. R. v.

(MAN.)

Speedy trial—Preferring charge different from that in warrant of commitment—Crim. Code, secs. 767, 773.

5

CAVANAGH v. McILMOYLE.

(N.W.T.)

Liquor License Ordinance—Appeal from conviction—Affidavit negating guilt—Statutory requisites—Jurisdiction—Waiver—N.W.T. Ord. 1900, ch. 32, sec. 22—Crim. Code, secs. 880, 893.

88

CHANDLER, R. v.

(N.S.)

Fisheries—Provincial foreshore limits—Dominion license for exclusive rights invalid—Federal regulation of fisheries—"Trap net" defined—Sub-sec. 7 of sec. 14 of The Fisheries Act (Can.) ultra vires—R.S.C. 1886, ch. 95.

308

CHARLIER, R. v.

(QUE.)

Contempt of court—Newspaper comment—Newspaper proprietor commenting on prosecution of indictment against himself—"Pending cause"—Requiring security to refrain from further newspaper comment until case ended—Crim. Code, secs. 14, 290. 486

CHILCOTT, R. v.

(ONT.)

Fortune telling—Written application—Contract negating intent to deceive—Palmistry and clairvoyance—Crim. Code, sec. 396. 27

CHISHOLM, R. v.

(N.S.)

Witness fees—Provincial criminal law—Statute fixing per diem rate—Time and manner of payment—Fine for non-attendance where fee not prepaid—Conviction set aside—Nova Scotia Liquor License Act, 1900, sec. 161—R.S.N.S. ch. 100. 493

COHON, R. v.

(N.S.)

Speedy trial—Adding new charge—Previous leave of Judge necessary—Perjury in affidavit used in civil action—Stating the offence—Several charges on one affidavit—Affidavit an entire statement not severable—Postponing perjury trial pending the civil action—Regularity of reserved case—Remitting all the evidence on question of sufficiency to convict—Crim. Code, secs. 146, 601, 743, 773. 386

COLLINS v. HORNING.

(ONT.)

Agricultural fairs—Exhibition prizes—Horse racing—Classification—Fraudulent entry—Ontario statute respecting—Validity of—Amendment of conviction on appeal—Costs of conveying to gaol—R.S.O. 1897, ch. 254—R.S.O. 1897, ch. 90, sec. 4—2 Edw. VII. (Ont.), ch. 12, sec. 15. 514

- DAVIDSON, R. v. (N.W.T.)
 Certiorari—Security—Deposit of cash without written condition—N.W.T. Liquor License Ordinance—Keeping bar open during prohibited hours—Want of allegation and proof of accused being a licensee—Preliminary objections to certiorari—Time for—Crim. Code, sec. 892. 117
- DREW v. THE KING (No. 1). (QUE.)
 Perjury—False oath made before de facto legal tribunal—Magistrate incompetent under special statute under which charge is laid—Crim. Code secs. 145, 616. 241
- DREW v. THE KING (No. 2). (CAN.)
 Perjury—False oath made before de facto legal tribunal—Magistrate incompetent under special statute under which charge is laid—Cr. Code, sec. 145. 424
- FORTIER, Ex parte. (QUE.)
 Bail—Habeas corpus—Felony or misdemeanor before the Criminal Code, 1892—Distinction affecting right to bail—Probability of appearance for trial if bailed—Evidence on preliminary evidence—Serious doubt as to guilt—Cr. Code, secs. 423, 602. 191
- GAUL v. TOWNSHIP OF ELLICE. (ONT.)
 Summary conviction—One fine against persons jointly charged—Separate offences—Enforcing invalid conviction—Protection of peace officer although he is prosecutor—Municipal Council—Resolution to pay costs of enforcing invalid process—Ultra vires—R.S.O. 1897, ch. 88, secs. 1, 13, 14—Cr. Code, secs. 21, 31, 33, 511, 980. 15
- HAWES, R. v. (N.S.)
 Common assault—Limit of punishment upon summary trial—City stipendiary magistrate—Extended jurisdiction of Court of General Sessions—Imprisonment in default of paying fine limited to three months—Cr. Code, secs. 265, 785, 872. 238

HAYES, R. v.

(ONT.)

Alien labour law—Knowingly assisting importation under contract—Omission to charge scienter—Invalidity not curable on certiorari—Importation of workman born in foreign country of British parents—"Aliens or foreigners," meaning of—Canada Statutes, 1897, 60-61 Vict. ch. 11; 1901, 1 Edw. VII. ch. 13—Cr. Code, sec. 889.

357

HAYES v. THOMPSON.

(B.C.)

Liquor license—Saloons—Hotel bar-rooms—Sunday Observance By-law—Validity of—R.S.B.C., 1897, cap. 144, sec. 50.

227

HAYWARD, R. v.

(ONT.)

Theft under \$10—Summary trial—Trial before town police magistrate—Limit of punishment is six months' imprisonment—Section 785 excludes cases where section 783 applies—Marginal note, "in certain other cases"—Cr. Code, secs. 752, 783, 785, 787.

399

HERBERT, R. v.

(ONT.)

Murder—Complicity of two persons jointly indicted—Plea of guilty by one prisoner—Acquittal of other prisoner on plea of not guilty—Subsequent application to change plea of "guilty" to "not guilty"—Special circumstances—Guilt of prisoner applying to change plea, inconsistent with verdict acquitting other defendant—Cr. Code, secs. 227, 231.

214

HOLMES, R. v.

(B.C.)

Indictment—Grand Jury—Failure to endorse name of every witness—Motion to quash—Code, sec. 645, directory only—Remitting bill of indictment to Grand Jury to endorse names of additional witnesses heard—Cr. Code, secs. 273, 645.

402

JAMES, R. v.

(ONT.)

Merchandise marks—Apples fraudulently packed—Having in possession for sale—Mens rea—"Faced surface," meaning of—Fruit Marks Act (Can.) 1 Edw. VII. ch. 27.

159

JOHNSON, R. v. (MAN.)

Lottery—Advertising lottery scheme—Sale of lottery tickets—Prize dependent upon chance without skill—Illusory condition seeming to involve skill—Condition without probable chance of failure—Device to evade lottery law—Cr. Code, sec. 205.

48

JOHNSON, R. v. (QUE.)

Conspiracy—Attempt to defraud—Employee disclosing employer's secrets for reward—Railway company—Information of special audits on passenger trains—Proof of intent to cause financial loss to company—Indictment for conspiracy with persons unknown—Particulars disclosed by witness at trial—Instruction to jury as to recommending to mercy—Discretion—Cr. Code, secs. 394, 611, 616, 617.

232

JOSEPH, R. v. (QUE.)

Summary conviction—Joint appeal by several defendants—Recognizance—Two sureties essential—Cr. Code, secs. 879, 880.

144

KARN, R. v. (ONT.)

Reserved case on Crown's application—Discretion to refuse new trial notwithstanding error below—Erroneous direction not resulting in mis-trial—Cases in which reserved case should be refused to the prosecution—Placing accused twice in jeopardy—Drugs for procuring miscarriage—Unlawful advertisement—Proof of intent—When interpretation a question for the jury—Cr. Code, secs. 179, 743, 744.

479

KENNEDY, R. v. (N.S.)

Unlawful possession of "still" or rectifying apparatus—Possession "in any place," meaning of—Inland Revenue Act, R.S.C. 1886, ch. 34—Stat. Canada, 1897, ch. 19, sec. 6, and 1898, ch. 27, sec. 3.

29

KING (THE) v.—. (Indexed under name of defendant.)

- KNEELAND, R. v.** (ONT.)
 Assembly in public street—Persons of general good character—Vagrancy—Cr. Code, sec. 207. 81
- KOMIENSKY, R. v. (No. 1).** (QUE.)
 Speedy trial—Electing trial without a jury—Actual custody a pre-requisite—Effect of return of true bill by Grand Jury—Exclusive jurisdiction of jury Court—Cr. Code, secs. 765, 767. 524
- LAURIN, R. v. (No. 4).** (QUE.)
 Homicide—Dying declaration—Requisites—Declarant's belief in impending death—Want of hope of recovery—Cr. Code, sec. 227. 104
- LAURIN, R. v. (No. 5).** (QUE.)
 Contradicting one's own witness—Other relevant testimony admissible although inconsistent—Witness hostile or adverse—Refreshing the memory—Previous depositions on preliminary enquiry—Procedure—Right of cross-examination on deposition produced to refresh memory of witness—Cr. Code, secs. 699, 700. 135
- LAVOIE, R. v.** (QUE.)
 Public meeting—Disturbance—R.S.Q., Arts. 2946, 2964 R.S.C. 1886, ch. 152—Cr. Code, sec. 173. 39
- LE BLANC, R. v.** (MAN.)
 Right of reply—Counsel representing the Attorney-General—Defence adducing no evidence—Summing up for prosecution—Cr. Code, sec. 661. 348
- LEWIS, R. v.** (ONT.)
 Jurisdiction of magistrate—Statute requiring sworn information—Amended information not re-sworn—Waiver by accused—Failure to object—Record of conviction—Omission to state time and place of offence—Reference to depositions on certiorari—Master and Servant Act (Ont.)—1 Edw. VII. (Ont.), ch. 12, sec. 14—1 Edw. VII. (Ont.), ch. 13, sec. 1—2 Edw. VII. (Ont.), ch. 12, sec. 15—Cr. Code, sec. 889. 499

McCLEAVE v. CITY OF MONCTON. (CAN.)

Police constable—Negligent performance of duty—
 “Respondeat superior”—Liability of municipal cor-
 poration—Canada Temperance Act—Illegal destruction
 of liquors seized.

219

McDONALD (JOSEPH), R. v. (N.S.)

Summary conviction—Imprisonment and fine—Further
 imprisonment in default of payment—Privilege of re-
 lease on paying fine during imprisonment—Warrant of
 commitment omitting privilege—Valid conviction sus-
 taining warrant—Computing term of imprisonment—
 One conviction for distilling spirits and fermenting
 beer—Inland Revenue Act, R.S.C. 1896, ch. 34, sec. 159
 —Cr. Code, secs. 872, 886, 907.

1

McLEOD, R. v. (No. 1). (N.W.T.)

Liquor License Ordinance — Appeal — Affidavit of
 merits—Jurisdiction—N.W.T. Ordinances 1900, ch. 32,
 sec. 22—Cr. Code, secs. 880, 881.

23

McLEOD, R. v. (No. 2). (N.W.T.)

Liquor license law—Illegal sales by licensee, his ser-
 vant, agent or employee—Statutory presumption—Val-
 idity—Servant's acts attributable to master—Fine and
 imprisonment—Constitutional law—Interference with
 liberty of the subject—Forfeiture of license for second
 offence—Prior offence during a previous license term—
 Appeal from summary conviction—Expediting the
 hearing—N.W.T. Ordinances 1900, ch. 32, sec. 22, and
 1901, ch. 33, sec. 21—Cr. Code, secs. 879, 880.

94

McKAY, R. v. (N.S.)

Reserved case—Question reserved inapplicable to evi-
 dence—Quashing reserved case—Theft—Recent posses-
 sion—Presumption—Rebuttal—Reasonable account of
 possession—Time of giving—Cr. Code, secs. 314, 743.

151

- MAYER v. VAUGHAN** (No. 2). (QUE.)
Post letter—Detention and search of letter carrier by detective officer—Reasonable and probable cause—Right of search—Release by officer without complaint laid—Cr. Code, secs. 4, 326. 68
- MERCIER v. PLAMONDON.** (QUE.)
Summary conviction—Certiorari—Moneys received by magistrate under the conviction—Recovery after conviction quashed—Vagrancy—Cr. Code, 207—Art. 833, C.C.P. (Que.). 223
- MERCIER, R. v.** (QUE.)
Summary conviction—Certiorari—Power of Superior Court in Province of Quebec over inferior Courts—Vagrancy—Public place—Insulting language—Impeding or incommoding passengers—Uncertainty in conviction—Cr. Code, sec. 207. 44
- MONTREAL, CITY OF, v. FORTIER.** (QUE.)
Sunday observance—Montreal city by-law as to petty trading—Sale of cigars and confectionery—By-law invalid for unreasonableness. 340
- MULLEN, R. v.** (ONT.)
Reserved case—Application for—Two dissenting jurors led to suppose that ten might convict—Jury not polled—Failure to object to verdict recorded—Evidence of juror inadmissible to contradict formal assent—Cr. Code, secs. 735, 743 (2). 363
- MURFINA v. SAUVÉ.** (QUE.)
False arrest—Damages—Liability—Justice of the peace issuing a warrant of arrest without inquiring into complainant's grounds—Cr. Code, secs. 558, 559, 569. 275
- NEUBERGER, R. v.** (B.C.)
Summary conviction—Immediate payment of fine—No right of appeal—Deposit in lieu of recognizance—Requisites of—Return by justice to Appellate Court—Cr. Code, secs. 879, 880, 888. 142
B—C.C.C. '03.

- NICHOL v. POOLEY (No. 1). (B.C.)
 Criminal libel—Costs—Taxation or action for—Stay—
 Cr. Code, secs. 833, 835. 12
- NICHOL v. POOLEY (No. 2). (B.C.)
 Criminal libel—Costs—Taxation or action for—Stay—
 Cr. Code, secs. 833-35. 269
- NICHOL, R. v. (B.C.)
 Criminal libel—Commission to take evidence abroad—
 Commission evidence not used at trial—Costs of—Dis-
 agreement of jury—Abortive trials—Costs of—Provin-
 cial civil practice made applicable by Code—Cr. Code,
 secs. 833, 835. 8
- PAQUET v. LAVOIE. (QUE.)
 Civil remedy for criminal act—Suspension of, until
 after criminal prosecution—Constitutionality of Code,
 section 534—Introduction of English criminal law in
 Quebec—Incident modification of civil rights as in Eng-
 land—Quebec Act, 14 Geo. III. (Imp.), ch. 83, sec. 11—
 Cr. Code, secs. 534, 865, 866. 314
- PHINNEY, R. v. (No. 1). (N.S.)
 Theft—Plea of insanity—Instruction that no evidence
 in support—Question of law—Verdict of not guilty be-
 cause of insanity—Case reserved on Attorney-General's
 application—Motion to quash—Placing a prisoner twice
 in jeopardy—Cr. Code, secs. 11, 305, 736, 743, 744. 469
- POWER, R. v. (N.S.)
 Finding sureties to keep the peace—Costs ordered
 against defendant — Imprisonment for non-payment
 only authorized in default of distress—Crim. Code,
 secs. 870, 959. 378
- QUEEN (THE) v. ——— (Indexed under name of
 defendant.)
- REGINA v. ——— (Indexed under name of defendant.)

REX v. ——— (Indexed under name of defendant.)

ROGERS, R. v. (N.B.)

Place of trial—Indictable offence—Witness in same country too ill to attend—Removal of Court and jury to his residence to take his evidence—Consent of counsel in matter not affecting the Court's jurisdiction—Crim. Code secs. 246, 673, 677, 681, 687. 419

SHEPHERD, R. v. (N.S.)

Keeping bawdy house—Describing the offence—"House, room, set of rooms or place of any kind"—Uncertainty in conviction—Summary trial by Magistrate—Consent irregularly obtained—Omission of magistrate to state option of jury trial—Crim. Code, secs. 195, 198, 786. 463

SING, R. v. (B.C.)

Summary conviction—Two similar charges on different informations tried consecutively—Reserving judgment on first until evidence heard on second—Dismissal of first and conviction on second charge—Certiorari—Affidavit of magistrate to prove that evidence in each case separately considered—Illegal sale of liquor—Indian Act—Cr. Code secs. 845, 850. 156

SITEMAN, R. v. (N.S.)

Summary trial—Release on suspended sentence—Procedure to bring offender up for sentence—Information under oath as to breach of recognizance—Summary trial and acquittal for second offence of same kind—Keeping disorderly house—Cr. Code secs. 198, 207, (j), 783, 971, 973. 224

SMITH'S BAIL, Re (N.S.)

Recognizance to keep the peace—When and by whom two years term may be required—Stipendiary exercising "summary trial" powers must shew jurisdiction on face of recognizance—Application of Code Form XXX.—Estreat of recognizance refused—Crim. Code, secs. 958, 959. 416

STEELE v. MABER.

(QUE.)

Prize fight—Boxing exhibition—Sham encounter—Aiding and promoting—Crim. Code, secs. 92, 94, 95. 446

TOWNSHEND, R. v. (No. 2).

(N.S.)

Stated case—Application to magistrate after unsuccessful appeal from summary conviction—*Res judicata*—Crim. Code, secs. 879, 880, 900. 519

TREMBLAY, Ex Parte.

(QUE.)

Habeas corpus—Jurisdiction in province of Quebec—Judicial districts—Appeal side of the Court of King's Bench—Habeas Corpus Act, C.S.L.C. ch. 95—Crim Code, secs. 207(*f*), 872(*b*). 147

TREVANE, R. v.

(ONT.)

Preliminary enquiry—Full opportunity to cross-examine—Depositions as evidence—Cross-examination not finished through illness of witness—Waiver of right to continue—Cr. Code, secs. 590, 687. 124

VENOT, R. v.

(N.S.)

Habeas corpus—Return—Two warrants of commitment for same offence—No intention shewn that second in substitution for first irregular warrant—Theft—Summary trial—Cr. Code, secs. 305, 785, 786. 209

VERRAL, R. v.

(ONT.)

Foreign commission—Order for while preliminary enquiry pending—Evidence under commission admissible on preliminary enquiry—Return of commission—Practice—Crim. Code, secs. 681, 683. 325

WAGNER, R. v.

(N.WT.)

Valuable security—Lien note—Cr. Code, sec. 360. 113

WALLACE, R. v.

(N.S.)

Evidence—Wife as witness against her husband—Husband's statement made in presence of wife and another — Incompetency to disclose communication made during marriage—Canada Evidence Act, 1893, sec. 4.

323

WALSH, R. v.

(ONT.)

Ontario Election Act—Voting on the Liquor Act (Ont.) 1902—Special court to try balloting offences—Legislative power of province to confer judicial authority on county judge outside of his county—Summary trial by special court without a jury—Adjournment for sentence—Validity of reference to public vote to bring statute into force—2 Edw. VII. (Ont.) c. 33.

452

WATSON AND KENWAY, R. v.

(N.S.)

Highway—Common law right of free passage—Assembly of religious nature on town street—"Salvation Army"—Obstruction of street by assembled crowd—Liability of members.

331

WENER, R. v.

(QUE.)

Option for speedy trial—In what cases it can be exercised—Bill of indictment preferred to the grand jury charging additional parties to those committed—When accused must elect for speedy trial—Adding or substituting another charge—Crim. Code, secs. 765, 767, 773, 775.

406

WILSON, R. v.

(ONT.)

Extortion by threats—Threatening to accuse physician of having procured an abortion—Demand justified as made only for separate civil claim—Proof of civil claim inadmissible in defence—Cr. Code, sec. 405.

131

YATES, R. v.

(N.S.)

Highway—Sidewalk—Obstruction—Marching in procession—Impeding free passage of foot passengers—
Nova Scotia Towns Incorporation Act, 1895.

282

YOUNG, R. v.

(MAN.)

Bawdy house—Definition—Offence of keeping—Occupation by or resort to by more than one female— Cr.
Code, secs. 195, 198, 783.

42

CASES CITED, VOL. VI.

Adams, R. v., (1829) 3 C. & P. 600.....	155
Alderson v. Palliser [1901] 2 K.B. 833.....	91, 93
Allen, R. v., 15 East 333.....	59
Anderson, Ex parte, (1898) 34 Can. Law Jour. 392.....	495
Anon (1826) 2 C. & P. 459.....	155
Attorney-General v. Bertrand, L.R. 1 P.C. 520.....	420, 422
Attorney-General v. Flint, 16 Can. S.C.R. 707.....	39
Attorney-General v. Hotham, Turn. & Russ. 209.....	427
Attorney-General (Canada) v. Provinces, 18 A.C. 712.....	311
Atwood, R. v., (1787) 2 Leach C.C. 464.....	201
Aurora v. Markham, 32 Can. S.C.R. 457.....	385
Bacon's Case, Hodgins' Elec. Cases 129.....	362
Bagley v. Jennings, 58 Hun. (N.Y.) 57.....	146
Bain, R. v., (1877) Ramsay's Cases 192.....	398
Baker, R. v., 1 East 186.....	59
Bannerman, R. v., (1878) 43 U.C.Q.B. 547.....	202
Basingstoke, R. v., 19 L.J.M.C. 28.....	120, 123
Baskett, R. v., (1902) 6 Can. Cr. Cas. 61.....	330
Basten v. Carew, 3 B. & C. 649.....	59
Beamish, R. v., (1901) 5 Can. Cr. Cas. 388.....	520
Beardmore, R. v., 8 C. & P. 260.....	139
Beckwith, R. v., 1 P.R. (Ont.) 284.....	362
Beckwith, R. v., (1859) 8 U.C.C.P. 274.....	201
Belanger, R. v., 6 Can. Cr. Cas. 295.....	405
Bennett, R. v., 3 O.R. 45.....	61
Bennett, R. v., (1902) 5 Can. Cr. Cas. 456, 4 O.L.R. 205.....	495, 501
Berry, R. v., Bell C.O. 46.....	438
Bigelow, R. v., 4 Can. Cr. Cas. 337.....	26
Birkett, R. v., (1839) 8 C. & P. 732.....	201
Bishop Dyke, Re, 6 R. & G. 65, 263.....	521
Bitton, R. v., 6 C. & P. 92.....	306
Black, R. v., (1878) 43 U.C.Q.B. 180.....	98, 99
Booth v. Powell, 53 J.P. 687.....	340
Booth, R. v., (1890) unreported.....	339
Boulton, R. v., 4 A. & E. 507.....	64
Boulter, R. v., (1852) 5 Cox C.C. 543.....	201
Bowdler's Case, 17 L.J.Q.B. 243.....	4
Bowers, R. v., (No. 2) (1903) 6 Can. Cr. Cas. 264.....	402
Bowles v. Johnson, 1 W. Bl. 36.....	497
Bowman, R. v., (1833) 6 C. & P. 101.....	176
Bownes, R. v., Ramsay's Cases (Que.) 192.....	398
Brady, R. v., 12 O.R. 358.....	61
Braham v. Joyce, 4 Exch. 487.....	4
Branyan, R. v., 1 Leach C.C. 27.....	170, 181, 188
Bridge v. Ford, 4 Mass. 642.....	418
Bright and Toronto, Re, (1862) 12 U.C.C.P. 433.....	230
Brockville Election, Hodgins' Elec. Cases 129.....	362
Brown v. Clark, (1843) 12 M. & W. 24.....	11
Brown v. Dalby, 7 U.C.Q.B. 162.....	321

Browne v. Cumming, 10 B. & C. 70.....	174, 181, 183, 186
Buchanan, R. v., (1898) 1 Can. Cr. Cas. 442.....	404, 405
Bullard, R. v., (1872) 12 Cox 353.....	307
Bulmer, R. v., 5 Mont. L.N. 287.....	423
Burke, R. v., 24 O.R. 64.....	413
Burns, R. v., 4 Can. Cr. Cas. 323.....	476
Button, R. v., [1900] 2 Q.B. 597.....	517
Buttrick v. Lowell, 1 Allen (Mass.) 172.....	221
Caddy v. Barlow, 1 M. & Ry. 275.....	174, 181, 183
Cameron, R. v., (1898) 2 Can. Cr. Cas. 173.....	423
Caminada v. Hulton, 17 Cox C.C. 307.....	53
Carbray, R. v., (1887) 13 Quebec L.R. 100.....	307
Carpenter v. Mason, (1840) 12 Ad. & El. 629.....	360
Carpenters v. Haywood, Doug. 360.....	477
Carruthers, R. v., (1844) 1 Cox 138.....	483, 485
Castro, R. v., L.R. 9 Q.B. 356.....	256
Caudle v. Seymour, 1 Q.B. 889.....	278, 440
Cavanagh v. McIlmoyle, 6 Can. Cr. Cas. 88.....	97
Chamberlain v. People, 23 N.Y. 85.....	435
Champney's Case, (1836) 2 Lewin 258.....	201
Chaney v. Payne, 1 Q.B. 822.....	59
Chapman, R. v., Sayers' R. 203.....	466
Charge to Grand Jury, Re, 62 Fed. Rep. 840.....	306
Chetwynd, R. v., 23 N.S.R. 332.....	329
Christianborg, The, (1885) 10 P.D. 141.....	271
Christie, R. v., Carr. C.L. 202.....	112
Crockett, R. v., 4 C. & P. 544.....	112
Cluff, R. v., (1882) 46 U.C.Q.B. 565.....	123
Coady, R. v., (1882) 15 Cox 89.....	483
Cocker v. McMullen, 74 J.P. 245.....	207
Cockshott, R. v., [1898] 1 Q.B. 582.....	467, 501
Cohen v. Morgan, 6 Dowl. & Ry. 8.....	278, 281
Cole v. Manning, (1877) 2 Q.B.D. 611.....	200
Commonwealth v. Daggett, 16 Mass. 447.....	419
Commonwealth v. Downing, 9 Mass. 520.....	419
Commonwealth v. Parker, 1 Allen (Mass.) 1.....	465
Commonwealth v. Shea, 150 Mass. 314.....	465, 466
Coney, R. v., 8 Q.B.D. 534, 30 W.R. 678.....	452
Conklin, Re, (1871) 31 U.C.Q.B. 160.....	500
Cooksley v. Toomaten Oota, (1901) 5 Can. Cr. Cas. 26 (B.C.).....	523
Cooper, R. v., (1852) 3 C. & K. 318.....	155
Coppen v. Moore, 67 L.J.Q.B. 689.....	397
Cornell v. Guilford, (1845) 1 Denio N.Y. 510.....	21
Cornwall v. The Queen, 33 U.C.Q.B. 119.....	413
Coulson, R. v., (1893) 1 Can. Cr. Cas. 114.....	517
County Courts of B.C., In re, 21 Can. S.C.R. 446.....	455
Coyle, R. v., 7 Cox 74.....	423
Cracknell, R. v., (1866) 10 Cox C.C. 408.....	133
Cragg v. Lamarsh, 4 Can. Cr. Cas. 246.....	64
Crosby v. Leng, (1810) 12 East 413.....	321
Cross, Ex p., 26 L.J.M.C. 201.....	4
Crowhurst, R. v., (1844) 1 C. & K. 370.....	153
Curling v. Robertson, (1844) 7 M. & G. 525.....	10
Curtis v. Kesturn, 45 Ch. D. 509.....	292
Cyr, R. v., 12 P.R. 24.....	465, 467

Davies v. Kennedy, Irish R. 3 Eq. 31.....	64
Davies v. Toronto, (1887) 15 O.R. 33.....	454
DeGeer v. Stone, (1882) 22 Ch. D. 243.....	362
Dickinson, R. v., Russ. & R. 401.....	306
Dixon v. Wells, (1890) 25 Q.B.D. 249.....	504
Dodds, R. v., (1884) 4 O.R. 390.....	52
Doherty, Ex. p., (1887) 26 N.B.R. 390.....	123
Donnelly, Re, 20 U.C.C.P. 165.....	468
Doran, R. v., (unreported).....	319
Downer, R. v., 14 Cox 486.....	422
Dowse, R. v., (1865) 4 F. & F. 492.....	350
Doyle v. Bell, (1884) 11 A.R. 326.....	321
Drew v. The King, 6 Can. Cr. Cas. 241 (Que.).....	424
Durham, R. v., (1891) 55 J.P. 277.....	64, 65
Dyke, R. v., (1838) 8 C. & P. 261.....	201
Edwards v. Kerr, 13 U.C.C.P. 25.....	321
Egan, R. v., (1896) 1 Can. Cr. Cas. 112.....	268
Errington, R. v., 2 Lew. C.C. 148.....	108, 111
Ewington, R. v., Car. & Mar. 319.....	433
Farquharson v. Morgan, [1894] 1 Q.B. 552.....	93, 94
Farlar, R. v., (1837) 8 C. & P. 106.....	201
Ferguson v. Kinnoull, (1842) 1 Bell. Sc. App. 662.....	21
Fick, R. v., (1866) 16 U.C.C.P. 379.....	423
Fielding v. Thomas (1896) Wheeler Confed. 1079.....	454
Fingde, R. v., (1864) 9 Cox 430.....	395
Fisher v. Fisher, 28 Can. S.C.R. 494.....	384
Fletcher v. Calthorpe, 6 Q.B. 880.....	36, 38
Fletcher, R. v., 1 C.C.R. 320.....	438
Fletcher, Re, 1 D. & L. 726.....	4
Fordham, R. v., 9 L.J.M.C. 3.....	119
Fortier v. Mercier, 3 Rev. de Legis. 363.....	319
Foster, R. v., Russ. McL. 113.....	433
Foulkes, Ex p., 15 M. & W. 612.....	4
Freeman v. People, (1847) 4 Denio, N.Y. 61.....	423
Freeman, R. v., (1889) 18 O.R. 524.....	52
Fry, R. v., (1898) 19 Cox C.C. 135.....	157, 159
Fuller v. Prentice, 1 H. Bl. 40.....	497
Ganz, R. v., 9 Q.B.D. 93.....	78
Gardner, R. v., (1824) 1 C. & P. 479.....	133
Geiser, R. v., (1901) 5 Can. Cr. Cas. 154.....	520
Gerrans, R. v., (1876) 13 Cox 158.....	307
Gibson, R. v., 16 O.R. 704.....	329
Gibson, R. v., 3 Can. Cr. Cas. 451.....	414
Girdwood, R. v., (1776) 1 Leach 142.....	485
Gloster, R. v., 16 Cox 471.....	112
Graham, R. v., 15 Cox C.C. 310.....	84
Grahme's Case, 12 Howell 646.....	178
Grand Trunk Ry. v. Atchison, (1901) unreported.....	384
Grand Trunk Ry. v. Valee, (1901) unreported.....	385
Grand v. Brooklyn, 41 Barb. (N.Y.) 384.....	294
Greenvell v. Censor, 12 Mod. R. 145.....	182
Groenvelt v. Burrell, 1 Ld. Raym. 252.....	170, 180
Groenvelt's Case, 1 Ld. Raym. 213.....	4

Hackett v. King, 6 Allen (Mass.) 58.....	72
Halifax v. Vibert, 3 R. & C. 64.....	123
Hall v. Cox, [1899] 1 Q.B. 198.....	53
Hamilton v. Walker, [1892] 2 Q.B. 25.....	157
Harmer, R. v., (1848) 2 Cox 487.....	154
Hartley, R. v., 20 O.R. 481.....	61
Hazell, R. v., (1899) 2 Can. Cr. Cas. 516.....	208
Heffernan, R. v., (1887) 13 O.R. 616.....	19, 21, 22
Henderson, R. v., 2 Can. Cr. Cas. 364.....	120
Hewes, R. v., 3 A. & E. 732.....	176
Hewitt v. Cane, 26 O.R. 133.....	179, 187, 189, 383
Higgins, R. v., 18 O.R. 148.....	61
Hodge v. The Queen, (1883) 9 A.C. 117.....	456
Hoggard, R. v., 30 U.C.Q.B. 152.....	123
Homer v. Cadman, 55 L.J.M.C. 110.....	84, 288
Horton, R. v., (1897) 3 Can. Cr. Cas. 84.....	240
Howes, R. v., (1886) 1 B.C.R. part 2, p. 307.....	307
Hughes, R. v., 14 Cox 284.....	255
Hughes, R. v., (1879) 4 Q.B.D. 614.....	79, 442, 504
Huntington, R. v., 5 D. & R. 588.....	59
Hutchinson v. Lowndes, 4 B. & Ad. 118.....	3
Ivy, R. v., 24 U.C.C.P. 78.....	179, 187, 189, 383
Jackson v. Williamson, 2 T.R. 281.....	364
Jamieson, R. v., (1884) 7 O.R. 149.....	52
Jellyman, R. v., (1838) 8 C. & P. 604.....	201
Jenkins, R. v., L.R. 1 C.C.R. 187.....	112
Johnson, R. v., 2 C.C.R. 15.....	439
Jones v. Williams, 36 L.T.N.S. 559.....	58, 60, 61
Jordan v. Lewis, 2 Str. 1122.....	171, 186
Jordan, Re, 50 N.W.R. 1087.....	86
Joyce, R. v., 119 Sess. Papers.....	296
Kruse v. Johnson, (1898) 2 Q.B. 91.....	340
Lawrence, R. v., 1 Can. Cr. Cas. 295.....	415
Lawson, R. v., (1881) 2 P.E.I. Rep. 403.....	364
Legatt v. Tollervey, 14 East 302.....	171, 172, 184, 186
Lewis, Ex p., 21 Q.B.D. 197.....	336
Livingstone v. Massey, 23 U.C.Q.B. 156.....	320
Lonar, R. v., 25 N.S.R. 124.....	412
Lord v. Colville, 4 Drury 376.....	521
Lord v. The Queen, 31 Can. S.C.R. 165.....	92
Lusty v. Magrath, 6 U.C.O.S. 340.....	180, 183, 383
McAdam v. Weaver, 2 Kerr N.B. 178.....	254
McAllan, R. v., (1880) 45 U.C.Q.B. 402.....	122
McBerny, R. v., (1897) 3 Can. Cr. Cas. 339.....	158
McBride, R. v., (1856), 6 U.C.C.P. 84.....	202
McCleave, Ex p., 5 Can. Cr. Cas. 115.....	19, 22, 219
McDonald (M.), R. v., (1894) 26 N.S.R. 404.....	58, 59
McHenry v. Lewis, (1882) 22 Ch. D. 397.....	271
McKee v. McGrath, 30 L.R. Ir. 41.....	288
McKenzie, R. v., (1885) 2 Man. R. 168.....	467
McKibbin v. State, 40 Ark. 480.....	293
McLellan, R. v., 9 U.C.L.J. 75.....	350

McNutt, R. v., (1896) 3 Can. Cr. Cas. 184.....	500
McSorley v. St. John, 6 S.C.R. 531.....	21
Mackay v. Hughes, (1901) 19 Que. S.C. 367.....	271
Mann, R. v., 49 J.P. 743.....	130
Marcott, R. v., 4 Can. Cr. Cas. 437.....	28
Maritime Bank v. Receiver General, [1892] A.C. 437.....	455, 456
Markwell v. Dyson, 14 Q.B. 824.....	498
Marsden, R. v., M. & M. 439.....	350
Marsden v. Wardle, 3 E. & B. 695.....	93
Mason, R. v., 22 U.C.C.P. 246.....	423
Masters, Re, 33 L.J.Q.B. 146.....	3
Mathias, R. v., 2 F. & F. 570.....	290
Mayer v. Vaughan, 5 Can. Cr. Cas. 392.....	68
Mayhew, R. v., (1834) 6 C. & P. 315.....	202
Megson, R. v., 9 C. & P. 420.....	111
Mennier, Re, [1894] 2 Q.B. 415.....	201
Mercier, R. v., (1901) 6 Can. Cr. Cas. 44.....	223
Metropolitan v. Hill, 6 A.C. 193.....	443
Metropolitan v. Jackson, 3 A.C. 193.....	478
Middlesex, R. v., 5 B. & Ad. 1113.....	175, 182
Middlesex, R. v., 12 L.J.M.C. 59.....	64, 65
Midlam, R. v., 3 Burr. 1720.....	181
Mitchell, R. v., (1892) 56 J.P. 218.....	129
Mitchell, R. v., 17 Cox 503.....	423
Monaghan, R. v., (1897) 2 Can. Cr. Cas. 488 (N.W.T.).....	523
Moore, R. v., (1836) 7 C. & P. 270.....	201
Morgan, R. v., 2 B.C.R. 329.....	412
Morris, Ex p., 34 Can. Law Jour. 46.....	208
Morris, R. v., 1 C.C.R. 90.....	443
Morrison v. Kelly, 1 Wm. Bl. 384.....	171, 180
Murphy, R. v., 1 Arm. M. & O. (Irish) 206.....	108, 112
Nichol v. Pooley (No. 1), 6 Can. Cr. Cas. 12.....	269, 270
Nichol, R. v., 5 Can. Cr. Cas. 31.....	269, 270
Nixon, R. v., (1900) 5 Can. Cr. Cas. 33.....	268
Nunn, R. v., 12 Cox 316.....	512
O'Connell v. The Queen, (1844) 11 Cl. & F. 155.....	403, 404
O'Hara v. Dougherty, 25 O.R. 347.....	189
Orton, R. v., 14 Cox 226.....	451
Oxfordshire, R. v., 1 M. & Sel. 446.....	65
Parker, R. v., 9 Man. R. 203.....	53
Pearson v. Lovejoy, 53 Barb. (N.Y.) 407.....	146
Pease v. McAloon, 1 Kerr N.B. 111.....	321
Peek v. Shields, 6 Can. S.C.R. 639.....	322
Peerless, Re, 1 Q.B. 143.....	4
Pegram v. Styron, 1 M. & Ry. 459.....	433
Pletts v. Beattie, [1896] 1 Q.B. 519.....	207
Pletts v. Campbell, [1895] 2 Q.B. 229.....	207
Plumer, R. v., 30 U.C.Q.B. 41.....	288
Pocock v. Toronto, (1896) 27 O.R. 635.....	21
Pointon v. Hill, L.R. 12 Q.B.D. 306.....	84, 86
Poulett v. Hill, (1893) 1 Ch. 277.....	271
Powell, R. v., 48 J.P. 740.....	339
Prescott Election, Hodgins' Elec. Cases 1.....	362
Prestridge, R. v., (1881) 72 L.T. Jour. 93.....	129
Pugh v. Kerr, (1840) 8 Dowl. 218.....	11

Qualter, R. v., 6 Cox 357.....	111
Quatre Pattes, R. v., 1 L.C.R. 317.....	350
Racine, R. v., 3 Can. Cr. Cas. 446.....	268
Radnorshire, R. v., (1840) 9 Dowl. P.C. 90.....	360
Randolph, R. v., (1900) 4 Can. Cr. Cas. 165.....	400
Reed v. Cowmeadow, 7 C. & P. 82.....	71
Regina v. (Indexed under name of defendant).....	...
Renes, R. v., (1884) 17 N.S.R. 87.....	123
Rex v. (Indexed under name of defendant).....	...
Richards, R. v., (1868) 11 Cox C.C. 43.....	133
Richardson v. Peto, 1 M. & G. 896.....	422
Richardson, R. v., (1891) 20 Ont. R. 514.....	60
Richardson v. Willis (1872) L.R. 8 Ex. 69.....	184
Ridley v. Sutton, (1863) 1 H. & C. 741.....	10
Riel, R. v., (No. 2) (1885) 1 Terr. L.R. 60.....	422
Ritson, R. v., (1884) 15 Cox. 478.....	155
Robinson, R. v., (1796) 2 Leach 749.....	485
Robinson v. Toronto Ry., (1901) unreported.....	385
Roche, R. v., 4 Can. Cr. Cas. 64.....	498
Rodwell, R. v., 5 O.R. 186.....	120
Ross v. B.C. Electric Ry., (1900) 7 B.C.R. 394.....	404
Roy, R. v., 11 L.C.J. 93.....	512
Royal Templars v. Hargrove, 31 Can. S.C.R. 385.....	385
Russell, R. v., 6 East 427.....	287
Ryder v. Wombwell, L.R. 4 Ex. 32.....	478
Salter v. Hughes, Oldright's N.S.R. 409.....	302
Scully, R. v., (1901) 5 Can. Cr. Cases 1.....	167, 189, 383
Scully, R. v., 6 Can. Cr. Cases 167.....	383
Seddons, R. v., 16 U.C.C.P. 389.....	423
Seely v. Powers, (1835) 3 Dowl. 372.....	11
Sheritt, Ex p., L.R. 5 Q.B. 174.....	99
Silver v. State, 17 Ohio 365.....	435
Simington v. Colbourne, 4 Can. Cr. Cases, 367.....	94
Simpson Co., R. v., (1896) 2 Can. Cr. Cas. 272.....	523
Singleton v. Ellison, [1895] 1 Q.B. 607.....	43, 468
Smith v. Clark, 1 Paige (N.Y.) 391.....	146
Smith, Ex p., 27 L.J.M.C. 186.....	4
Smith v. Regina, M.L.R. 4 Q.B. 325.....	84, 86
Smith, R. v., (1845) 2 C. & K. 207.....	153
Smith, R. v., (1849) 1 Den. C.C. 510.....	485
Smith, R. v., 1 C.C.R. 110.....	437
Smith, R. v., (1873) 23 U.C.C.P. 312.....	112
Smith, R. v., 46 U.C.Q.B. 444.....	59
Smith, R. v., 25 N.S.R. 138.....	412
Smith, R. v., (1898) 3 Can. Cr. Cases 467 (N.S.).....	413, 421
Snow v. Hill, 14 Q.B.D. 588.....	38
Spice v. Bacon, 2 Ex. D. 463.....	64
Spilsbury, R. v., 7 C. & P. 187.....	111
Staats v. Garrett, 98 N.Y. 630.....	146
Stafford, R. v., 1 Can. Cr. Cas. 239.....	240
Stallard v. Marks, 3 Q.B.D. 412.....	207
Stannard, R. v., L. & C. 349.....	466
State v. Beebe, 17 Minn. 241.....	306
State v. Calley, 104 N.C. 858.....	43, 468
State v. Sheppard, 97 N.C. 401.....	306

State v. Smith, 2 Greenl. R. 62.....	419
Stephenson v. Garnett, (1898) 1 Q.B. 677.....	272
Stephenson v. Rogers, 63 J.P. 230.....	208
Stevens, R. v., (1898) 31 N.S.R. 124.....	55
Stewart v. State (1853) 13 Ark. 720.....	423
Still v. Walls, 7 East 534.....	3
Stoddart v. Prentice, 5 Can. Cr. Cas. 103.....	492
Stoddart, R. v., 70 L.J.Q.B. 189.....	53
Stoddart v. Sagar, [1895] 2 Q.B. 474.....	53
Stone, R. v., 22 Eng. L. & Eq. 593.....	435
Stubbs, R. v., (1855) Dears. 555.....	201
Stuchberry v. Spencer, 51 J.P. 181.....	207
Sutton, R. v., 42 U.C.R. 224.....	18
Taylor, Ex p., (1898) 34 C.L.J. 176.....	4
Territory v. Pendry, 9 Montana 67.....	306
Theriault, R. v., (1894) 2 Can. Cr. Cas. 444.....	423
Thompson, Ex p., 24 J.P. 805.....	4
Thompson, R. v., 1 Cox 268.....	298
Thornhill, R. v., 8 C. & P. 575.....	422
Toakley, R. v., 10 Cox 406.....	350
Townsend, R. v., 10 Cox 356.....	258
Townsend, R. v., (1896) 3 Can. Cr. Cas. 29.....	404, 405
Townshend, R. v., (No. 1) 5 Can. Cr. Cas. 143.....	520
Trepanier, R. v., (1901) 4 Can. Cr. Cas. 259.....	474
Troop Co., R. v., (1899) 29 Can. S.C.R. 673.....	55
Turner v. Postmaster General. (1864) 5 B. & S. 756.....	440, 504
Turner, R. v., 1 Moo. C.C. 347.....	423
Tyler, R. v., (1835) 1 Mood. C.C. 428.....	485
Tynemouth v. Atty.-Genl., [1899] A.C. 293.....	21
Tyson, R. v., 1 C.C.R. 107.....	336, 437
U. K. Electric, R. v., 31 L.J.M.C. 168.....	287
United States v. Babcock, 4 Bailey 595.....	433
Valin v. Langlois, 3 Can. S.C.R. 1.....	322
Van Butchell, R. v., 3 C. & P. 631.....	112
Vandercomb, R. v., (1796) 2 Leach C.C. 708.....	178
Vantassel, R. v., (1894) 5 Can. Cr. Cas. 128.....	58
Vincent, R. v., 9 C. & P. 91.....	512
Vine, R. v., L.R. 10 Q.B. 195.....	99
Waite v. Spurgin, (1836) 4 Dowl. 575.....	11
Walsh v. Nattress, 19 U.C.C.P. 453.....	320
Walsh, R. v., 29 N.S.R. 521.....	55
Ward, R. v., (1888) 21 N.S.R. 19.....	123
Wason, R. v., 17 A.R. 221.....	90, 91, 516
Webb, R. v., (1834) 6 C. & P. 595.....	201
Wells, R. v., (1829) M. & M. 326.....	201
Whelan v. Regina, 28 U.C.Q.B. 2. 52.....	422, 423
Whittaker, R. v., (1894) 24 O.R. 437.....	123
Wigley, R. v., 2 Lewin 258(n).....	201
Wilkes, R. v., (1836) 7 C. & P. 272.....	201
Wilkinson, R. v., (1878) 42 U.C.Q.B. 492.....	423
WiHiams, R. v., 3 Can. Cr. Cas. 9.....	473, 476
Williams, R. v., 8 Man. R. 342.....	120

Williams, R. v., 6 Cox 343.....	139
Williams v. Robinson, 20 U.C.C.P. 255.....	320
Worthington v. Jefferies, L.R. 10 C.P. 379.....	93
Yates, R. v., (1841) C. & Mar. 132.....	201
Yorkshire, R. v., 5 B. & Ad. 667.....	65
Young, R. v., 10 Cox 371.....	451
Young, R. v., (1901) 4 Can. Cr. Cas. 580.....	226
Young, R. v., (1902) 6 Can. Cr. Cas. 42.....	468

CORRIGENDA.

Page 132, line 4, insert before "alone" the words "be supported under this indictment upon the alleged seduction."

Page 295, head-note number 3, line 2, for "initiate" read "initial."

Canadian Criminal Cases.

Reports of Cases in Criminal and Quasi-Criminal matters
decided in the Courts of Canada and of the Provinces
thereof.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE QUEEN v. JOSEPH McDONALD.

Summary conviction—Imprisonment and fine—Further imprisonment in default of payment—Privilege of release on paying fine during imprisonment—Warrant of commitment omitting privilege—Valid conviction sustaining warrant—Computing term of imprisonment—One conviction for distilling spirits and fermenting beer—Inland Revenue Act, R.S.C. 1896, c. 34, s. 159—Cr. Code, secs. 872, 886, 907.

1. A summary conviction for unlawfully distilling spirits and making or fermenting beer without a revenue license is not void as charging two offences, but is to be held to charge only one offence by virtue of Code sec. 907.
2. The term of imprisonment under a summary conviction of a person not then in custody commences from the date of his arrest under the warrant of commitment.
3. It is sufficient that the warrant of commitment states only the length of time for which imprisonment was adjudged, without specifying that the term of imprisonment shall date from the arrest.
4. Where a summary conviction imposed both imprisonment and fine, and in default of payment of the latter, a further detention for a fixed term unless the fine were sooner paid, the omission from the warrant of commitment of the latter proviso as to payment during the term is a defect which is cured by Code sec. 886, and the warrant is valid.

ARGUED: May 25, 1898.

DECIDED: June 3, 1898.

Motion in Chambers under Chapter 117 of the Revised Statutes of Nova Scotia, fifth series, "Of Securing the Liberty of the Subject," on the return of an order in the nature of a writ of

habeas corpus for the discharge from custody of Joseph McDonald, the defendant, a prisoner in the common jail at Sydney, C. B., under a warrant of commitment returned by the jailor reciting a conviction against the defendant by two justices of the peace in and for the County of Cape Breton "for that he, the said Joseph McDonald, on or about the 29th day of December, A.D., 1897, at Loon Lake, East Bay, in the County of Cape Breton aforesaid, without having a license then in force under the Inland Revenue Act, being chapter 34 of the Revised Statutes of Canada, unlawfully did distill or rectify a quantity of spirits and did make or ferment a quantity of beer on premises at Loon Lake, East Bay, in the County of Cape Breton, under his control, contrary to the provisions of the said Act, M. A. McDonald of Sydney, in the County of Cape Breton, Inland Revenue officer, being the informant," and was adjudged for his said offence to an imprisonment in said jail of three months absolute, and also to forfeit and pay a fine of \$200, and \$19.75 informant's costs, and if the said several sums and costs were not paid forthwith, the defendant was further adjudged to be imprisoned in the jail aforesaid for the term of six months, to commence at the expiration of his imprisonment aforesaid, unless the said several sums and the expense of conveying the said defendant to the said jail, amounting to the sum of \$1, were sooner paid.

The grounds relied on are referred to in the judgment of Ritchie, J.

HALIFAX, N. S., May 25, 1898.

W. A. Henry, for the prisoner.

F. F. Mathers, for the prosecutor.

HALIFAX, N. S., June 3, 1898.

RITCHIE, J.:—The objection that the conviction finds the person guilty of two offences is, I think, disposed of by section 907 of the Code.

It is not necessary to state the date that the imprisonment commences, as it begins from the time of the arrest: (See cases cited in Paley on Convictions, 7th ed., at page 269).

The description of McDonald is, I think, quite sufficient.

The last objection taken has raised a good deal of doubt in my mind. The conviction provides for imprisonment for six months, unless the said several sums, etc., are sooner paid.

The commitment recites the conviction correctly, which conviction is, I think, perfectly valid; but it directs the jailor if the sums, etc., be not paid, to imprison the said Joseph McDonald for the term of six months, omitting the words "unless the said sums, etc., be sooner paid," or any equivalent expression.

Such a commitment would, in my opinion, be void at common law, and the question is whether such defect is cured by legislation. I think it has been, and I do not think I could hold such a commitment void and discharge the prisoner in the face of section 886 of the Criminal Code, which provides that "no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same."

Application refused.

Note: Essentials of warrant of commitment.

The warrant of commitment is a precept in writing under the hand and seal of the justice, directed to a constable and to the keeper of the prison to which the party is to be committed. Paley on Convictions, 7th Ed. 267.

The warrant is sufficient if it describe the prison by its situation or other definite description, although it may be known by some other title. *Ibid.*

An order of final commitment to prison must be in writing: 2 Hawk. ch. 16, sec. 13. The detention of the party without such written authority can be justified for no longer time than is necessary for making it out: *Hutchinson v. Lowndes*, 4 B. & Ad. 118. The warrant should be drawn up in writing as soon as possible after the commitment is ordered: *Re Masters*, 33 L.J. Q.B. 146. The person convicted may be detained in custody by parol order till the return of a warrant of distress against his goods: *Still v. Walls*, 7 East. 534.

The warrant must be under the hand and seal of the justice: 2 Hawk. P.C., ch. 16, sec. 13; *Hutchinson v. Lowndes*, 4 B. & Ald. 118. Without

Note—(Continued): Essentials of warrant of commitment.

the seal the commitment is unlawful and the gaoler is liable for false imprisonment: 1 Hawk. P.C. 583. The warrant need not be dated, nor state the time from which the imprisonment is to commence; the period of imprisonment will be reckoned from the time of the defendant being taken into custody: *Bowdler's Case*, 17 L.J.Q.B. 243, 12 Q.B. 612, 619; *Ex parte Foulkes*, 15 M. & W. 612; *Braham v. Joyce*, 4 Exch. 487; overruling in this respect *Re Fletcher*, 1 Dowling & Lowndes 726. The warrant should name the justice and describe his official position as such: 2 Hawk. P.C., ch. 16, sec. 13; 2 Hale P.C. 122.

The offence must be stated with certainty with the same clearness and precision as is required in a conviction: Paley on Convictions, 7th Ed. 270. It should recite clearly the conviction of the accused and the amount of his punishment, and should shew that the offence is one over which the justice has jurisdiction: *Re Peerless*, 1 Q.B. 143. If the warrant does not set forth that the magistrate had adjudicated on the matter of imprisonment it does not shew jurisdiction to direct the imprisonment and is therefore void: *Ex parte Taylor* (1898), 34 C.L.J. 176 (P.E.I.).

A warrant of commitment cannot be recalled or withdrawn; nor can it be altered except where the statute specially authorizes such a course. A fresh commitment may, however, be lodged: *Ex parte Smith*, 27 L.J. M.C. 186, 3 H. & N. 227; *Ex parte Cross*, 26 L.J. M.C. 201.

It must be expressed in the warrant whether the commitment be for a time certain or only till the payment of a fine; the defendant ought to know for what he is in custody and how he may regain his liberty: *Dr. Groenvelt's Case*, 1 Ld. Raym. 213. If the imprisonment be not for any certain period but generally till the payment of a fine or the performance of some other act, the condition must be distinctly expressed and such as is authorized by statute.

Hard labour can only be adjudged when authorized by statute, and the warrant then contains a statement that the commitment is with hard labour. It is presumed that it is not ordered unless stated: *Ex parte Thompson*, 24 J.P. 805.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE BAIN, J.

THE KING v. CARRIÈRE.

Speedy trial—Preferring charge different from that in warrant of commitment—Cr. Code, secs. 767, 773.

1. Notwithstanding the provisions of sec. 773 of the Criminal Code, a judge should not, against the wish of a prisoner, give his consent, at the trial before him, under the speedy trials clauses without a jury, to any other charge being preferred than that upon which the prisoner was committed for trial, unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial.

ARGUED: April 12, 1902.

DECIDED: April 12, 1902.

THE accused was committed for trial by a magistrate after a preliminary inquiry on an information, dated the 26th of January, 1902, which charged that the accused "being in the employment of the Rural Municipality of St. Boniface as secretary-treasurer, and being entrusted by virtue of such employment with the receipt, custody and possession of the moneys of said municipality, did fraudulently and unlawfully steal" certain specified sums of money amounting in all to \$428.79, on certain specified dates, and the accused elected to take a speedy trial before a Judge on this charge.

On the 30th of November, 1901, another information had been laid against the accused, charging that he, "between the 31st day of December, 1899, and the 14th day of September, 1901, being secretary-treasurer of the Rural Municipality of St. Boniface, unlawfully stole various sums of money belonging to the said Rural Municipality, amounting in all to \$1,600." No one, however, appeared to prosecute this charge on the day fixed for its hearing, and the magistrate thereupon discharged the accused.

When the accused came up for his speedy trial before the judge on the day fixed for the trial, counsel for the Crown stated

that he did not intend to proceed against the accused on the charge on which he had been committed for trial, but wished, under the provisions of section 773 of The Criminal Code, to prefer a charge against him practically similar to the one that was set out in the information of the 30th of November, 1901, that the accused, between the 1st of December, 1899, and the 14th of September, 1901, had unlawfully and fraudulently converted to his own use the sum of \$1,629.98, being part of the moneys received by him as such secretary-treasurer.

WINNIPEG, April 12, 1902.

George Patterson, for the Crown.

R. G. Affleck (*Bonnar* with him), for the prisoner.

BAIN, J.:—Section 773 of The Criminal Code, read by itself, would certainly seem to be wide enough to enable the Crown, with the consent of the judge, to take the course that is proposed here. The section provides that the prosecuting officer “may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned in the depositions upon which the prisoner was so committed.”

If this provision is as wide as it appears to be, then I venture to question if it is right that it should find a place in a code of criminal law and procedure. When once a prisoner has elected to be tried by a judge, he has no power of re-election; and it seems unjust that it should be in any one's discretion that a prisoner who has waived his right to be tried by a jury may be compelled to stand his trial on another charge than the one on which he was committed and on which he consented to be tried speedily.

But the provisions of the section must be controlled to some extent at any rate by section 767, sub-section 3 (63 & 64 Vict., ch. 46). This provides that “if the prisoner has been brought before

a judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial." Then, if he pleads guilty, proceedings are to be taken as directed in this sub-section, and if he pleads not guilty, the trial is to proceed as directed in section 772.

I do not, however, find it necessary to decide what the strict legal construction of section 773 should be, because I am satisfied that in practice a judge should not, against the wish of the prisoner, give his consent to any charge being preferred against him unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial and on which he has been brought before a judge and consented to be tried without a jury.

In the present case the charge which it is now proposed to prefer against the accused is substantially different from the one on which he was committed for trial; and, although it was mentioned in one of the depositions that the whole shortage in the accounts appeared to be \$1,629.98, there was nothing to indicate to the accused that he might be indicted for stealing that sum. He had previously been accused before a magistrate of having stolen the amount that appeared to be short in his accounts, and the charge was dismissed for want of prosecution; and that would be another reason, if one were required, why I should refuse to allow that charge to be preferred against him now.

I refuse the application, and, as Mr. Patterson states that the Crown does not intend to proceed against the prisoner on the charge for which he was committed for trial, I order him to be discharged.

Prisoner discharged.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

THE KING v. NICHOL.

Criminal libel—Commission to take evidence abroad—Commission evidence not used at trial—Costs of—Disagreement of jury—Abortive trials—Costs of—Provincial civil practice made applicable by Code—Cr. Code, secs. 833, 835.

1. In British Columbia, following the practice there in civil cases, the costs of taking evidence under commission abroad on behalf of the defendant in a prosecution for criminal libel cannot be taxed against the prosecutor unless such evidence was used at the trial.
2. In British Columbia, following the practice there in civil cases, the costs of abortive trials of an indictment for criminal libel cannot be taxed under Cr. Code, secs. 833 and 835, against the party who ultimately fails in the litigation.

ARGUED: November 23, 1901.

DECIDED: November 27, 1901.

MOTION by defendant for an order that all the costs reserved to be dealt with by the trial judge by the order of McColl, J., be taxed and paid to defendant. In 1897 the defendant was indicted for a criminal libel at the instance of John Herbert Turner (then Premier and Minister of Finance) and Charles Edward Pooley, K.C. (then President of the Council). In 1898 defendant applied for and obtained from McColl, J., an order allowing him to take the evidence on commission of certain witnesses in England, and by the order it was provided that the costs of the commission be reserved to be dealt with by the trial judge. The indictment was tried three different times. The first trial was before McColl, C.J., and defendant put in the commission evidence, which was in support of his plea of justification. The jury disagreed and were discharged. At the second trial the jury disagreed and were discharged. At the third trial the defendant was acquitted. At the second and third trials the commission evidence was not used, but many of the documents

referred to in it and marked as exhibits were identified by the prosecutors in cross-examination and put in by counsel for defendant and marked as exhibits.

VICTORIA, B.C., November 23, 1901.

Langley, for the motion: The statutory enactment (Cr. Code Sec. 833) covers both party and party and solicitor and client costs. The costs must have been incurred by reason of the indictment. At the first trial neither of the prosecutors gave evidence and their counsel objected to the commission being read, and we would have been helpless without it. At the other trials they knew we had it, so gave evidence themselves and many of the documents referred to in the commission were identified by the prosecutors in cross-examination and put in evidence by counsel for defendant. It was necessary and proper at the time to get the evidence, and under the decision in *Bartlett v. Higgins* (1901), 2 K.B. 230, the defendant should get the costs of it. He cited also *Levetus v. Newton* (1883), 28 Sol. Jo. 166; *Folkard*, 869 (note), and *The Queen v. Steel* (1876), L.R. 1 Q.B. 482.

Cassidy, K.C., contra: The practice is that the costs of evidence not used at a trial cannot be taxed against the losing party, and as the commission evidence was not put in by defendant at the last trial, the costs of it cannot be taxed. He cited *Ridley v. Sutton* (1863), 1 H. & C. 741; *Gray on Costs*, 375, 406; *Curling v. Robertson* (1844), 7 M. & G. 525; *Brown v. Clarke* (1843), 12 M. & W. 24; *Seely v. Powers* (1835), 3 Dowl. 372; *Waite v. Spurgin* (1836), 4 Dowl. 575, and *Dominion, etc., Co. v. Stinson* (1881), 9 P.R. 177. As to meaning of "incurred," he cited *Stumm v. Dixon* (1889), 58 L.J., Q.B. 186; *Jewell v. Parr* (1857), 2 C.B.N.S. at p. 811, and *Brydges v. Fisher* (1835), 1 Scott 490.

At the conclusion of the argument His Lordship asked counsel if they wanted him to deal with the question of all the costs of the abortive trials as well as of the costs of the commission. Counsel for the prosecutors said he wanted the whole matter dealt

with, but counsel for defendant said his motion asked for the costs of the commission only and he objected to anything else being dealt with. His Lordship said he would deal with the whole matter notwithstanding the objection, and reserved his judgment.

VICTORIA, B.C., November 27th, 1901.

DRAKE, J.:—The questions argued on this summons were first, the question whether the evidence taken by commission on behalf of the defendant not being used could be taxed against the prosecutors.

Second. Whether the defendant was entitled to tax the costs of the abortive trials against the prosecutors.

The defendant was indicted for a criminal libel, and two trials took place in which the juries failed to arrive at a verdict, and were discharged. On the third trial there was a verdict for the defendant. In the first trial the evidence on the commission was read and used by the defendant. In the last and successful trial the defendant called no evidence, and therefore his counsel had the closing address to the jury.

The language of section 833 is that if judgment is given for the defendant he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment, and if no tariff of fees is provided with respect to criminal proceedings, the costs are to be taxed by the proper officer according to the lowest scale of fees allowed in such Court in a civil suit; but if such Court has no civil jurisdiction the fees shall be those allowed in a civil suit in a Superior Court according to the lowest scale. The result of this section is that the costs will have to be taxed according to the tariff of the Supreme Court.

Under the practice cases evidence not used at a trial cannot be taxed against the losing party. See *Ridley v. Sutton* (1863), 1 H. & C. 741, and *Curling v. Robertson* (1844), 7 M. & G. 525. The fact that the evidence was used on the abortive trial is not the same thing as if used on the successful trial. The evidence

used at the abortive trial cannot be treated as used at a subsequent trial without consent. If it was so, the parties might rely on the notes of evidence taken at the first trial and not call witnesses. This is sometimes done by consent, but I apprehend the Court would not have power to order this course to be adopted.

The other point as to the costs of abortive trials. The reports shew but few cases on this head. The case of *Seely v. Powers* (1835), 3 Dowl. 372, was followed by *Waite v. Spurgin* (1836), 4 Dowl. 575; and it is there laid down that if a judge discharges a jury from giving a verdict on the ground of their not being able to agree, the successful party will not be entitled to costs of the first attempt at trial. The case *Pugh v. Kerr* (1840), 8 Dowl. 218, although not exactly in point, has a bearing on the views held by the Court on this question. In this case the case had been set down for trial and the venue was changed at the defendant's request, and he was to pay the costs. This he neglected to do, and the plaintiff set down the case again and obtained a verdict. It was held he could not tax the costs of the abortive attempt to try as costs in the cause. Consequently he was not entitled to them. *Brown v. Clarke* (1843), 12 M. & W. 24, is a further authority following *Seely v. Powers*, *supra*, and Lord Abinger places it on the ground that an abortive trial such as this is analogous to a *venire de novo*, and the party ultimately successful is entitled only to the costs of the trial on which he succeeds.

Under these authorities I am of opinion that if the costs are to be taxed according to the laws governing the taxation of costs in civil cases that the evidence taken on commission, and not used at the trial on which a verdict was obtained, could not be taxed against the unsuccessful party, neither would the costs of the abortive trials. Each trial would be considered as a *venire de novo*, and the question is, does the language used in section 833, "The costs incurred by him by reason of such indictment," taken in conjunction with section 835, authorize the taxation of any other or different costs than such as would be allowed in a civil case. Section 833 is similar to the language in the English Stat-

ute, 6 and 7 Vict., Cap. 96, sec. 8, but that Act does not contain our section 835.

I think that section 835 indicates sufficiently that the costs to be allowed are all such costs as would be allowed in a civil case as far as applicable; and if the costs occasioned by an abortive trial, or by a commission not used, would be disallowed in a civil case, they ought equally to be disallowed in a libel case, and I so order accordingly.

Order accordingly.

Note: See the next case, *Nichol v. Pooley et al.* .

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE IRVING, J., IN CHAMBERS.

NICHOL v. POOLEY ET AL.

Criminal libel—Costs—Taxation or action for—Stay—Cr. Code, secs. 833-35.

1. Where the accused, after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs, the civil action will be allowed to proceed only on terms of the plaintiff undertaking to abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case.

ARGUED: February 3, 1902.

DECIDED: February 11, 1902.

AFTER the order made by DRAKE, J., in *The King v. Nichol*, reported *ante* p. —, disallowing Nichol the costs of the commission evidence and of the abortive trials, Nichol commenced this civil action against Messrs. Pooley and Turner, the prosecutors, for all the costs of the criminal libel action brought against him by defendants, and which ultimately resulted in his acquittal. The defendants now applied by summons "that all proceedings be stayed and the action dismissed on the ground that same is

frivolous and vexatious and an abuse of the process of the Court, or in the alternative for an order that all proceedings be stayed until the taxation of the plaintiff's costs sued for herein, already brought before the proper officer in that behalf by the plaintiff, and partially completed, is completed and closed, or until the said costs sued for herein are taxed as this Court may direct."

VICTORIA, February 3, 1902.

Cassidy, K.C., for the summons: Costs have already been taxed and an order in a matter of taxation has been made by *DRAKE*, J., therefore plaintiff cannot bring present suit. There must be taxation before suit. He referred to Cr. Code, secs. 833, 834, 835; *Odgers on Libel and Slander*, 643; *Richardson v. Willis* (1872), L.R. 8 Ex. 69; *Earl Poulett v. Viscount Hill* [1893], 1 Ch. 277; *The Christiansborg* (1885), 10 P.D. 152 and *Stephenson v. Garnett* [1898], 1 Q.B. 677.

Davis, K.C., contra, contended that order taken out *re* taxation was taken out as if made by Court of Oyer and Terminer, but that the Court had risen at the time the order was made and therefore the order was a nullity: *Annual Prac.* 1902, pp. 321-23.

Application to strike out statement of claim does not take place of demurrer. This case is similar to suit for costs by solicitor against client, and it is usual to have taxation after writ is issued. If order of *DRAKE*, J., was made by Criminal Court, there is no appeal, therefore plaintiff abandoned original proceedings and brought present suit. He cited *Dunlop v. Haney et al.* (1899), 7 B.C. 305, and *Dunlop v. Haney* (1900), 7 B.C. 307.

VICTORIA, B.C., February 11, 1902.

IRVING, J.:—No authority was cited for the proposition that taxation is necessary as a condition precedent to bringing the action.

As to the second point, it is not right that the plaintiff should pursue both his remedies, one must be stayed, but which? Mr.

Cassidy says the plaintiff ought to go on with the proceedings already instituted; that if he is now allowed to proceed with this action and abandon the taxation proceedings already instituted by him, that all the work already performed will be thrown away.

The plaintiff, on the other hand, says that if he is bound to follow out the taxation and is not allowed to go on with this action, he will not be at liberty to discuss the very matter upon which his right to recover the greater part of his costs depends.

It seems to me that I ought not to prevent the plaintiff from obtaining a decision on the questions in dispute. If there are two ways open to a litigant, one in which he can bring up the matter for decision, and the other in which he cannot, in my opinion he ought to be at liberty to pursue the most advantageous to him, otherwise there will be a denial of justice. And certainly I ought to do this if I can do so without doing any injustice to the defendants. I think that the order which I now make will sufficiently protect them; the order will be that the proceedings in this action will be stayed unless the plaintiff is willing to undertake to abide by such order as the judge at the trial of this action shall make, with regard to the costs of the taxation proceedings thrown away.

In the event of the plaintiff giving such undertaking then he shall be at liberty to proceed with this action, the taxation proceedings shall be stayed and the costs of this application shall be costs in the cause.

N.B.—Defendants appealed from this judgment and on 12th February, on their application, IRVING, J., ordered that the trial of the action should not take place until after the next sittings of the Full Court.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON AND ROBERTSON, JJ., SITTING AS A
DIVISIONAL COURT.

GAUL v. TOWNSHIP OF ELLICE.

Summary conviction—One fine against persons jointly charged—Separate offences—Enforcing invalid conviction—Protection of peace officer although he is prosecutor—Municipal Council—Resolution to pay costs of enforcing invalid process—Ultra vires—R.S.O. 1897, c. 88, secs. 1, 13, 14—Cr. Code, secs. 21, 31, 33, 511, 980.

1. A conviction is invalid if it awards one fine against three persons for their separate acts.
 2. A resolution of a Municipal Council to pay the costs of enforcing an invalid conviction in a criminal matter is ultra vires.
 3. A peace officer executing a warrant of arrest which he believes to be good is exempt from criminal responsibility therefor by sec. 21 of the Criminal Code, although the warrant was bad on its face as following a conviction also bad on its face.
 4. A constable is not disqualified from executing a warrant for enforcing a conviction for an offence under the Criminal Code, because of his having been the informant, nor does such fact disentitle him to the protection from civil action given to public officers by R.S.O. 1897, c. 88.
- Es. p. McCleave*, 5 Can. Cr. Cas. 115 (N.B.) distinguished.

ARGUED: December 5th, 1901.

DECIDED: February 13th, 1902.

APPEAL by the plaintiffs from the County Court of the County of Perth, in an action brought by Charles Gaul, his wife Margaret Gaul, and one Annie Bain, against the municipal corporation of the Township of Ellice and one John Murr, a constable, for malicious arrest, and for return of \$53.05 paid as a fine and costs in order to obtain their liberty.

The action was tried on the 15th and 17th June, 1901, before Barron, Co. J., with a jury.

It appeared at the trial that the plaintiffs had been convicted on the information of the defendant Murr, under section 511 of the Code, "for that the said" (the plaintiffs) "did at.....onwilfully commit damage, injury or spoil to or upon the highway," etc.

The conviction then proceeded: "and I adjudge the said" (three plaintiffs) "for the said offence, to forfeit and pay the sum of \$20 for penalty and \$10 for compensation to be paid and applied according to law, and also to pay to the complainant, John Murr, the sum of \$23.05 for his costs," and if not paid "I adjudge the said" (three plaintiffs) "to be imprisoned," etc.

It was alleged by the plaintiffs that the magistrate, being aware that the conviction was bad, refused to issue a warrant until indemnified by the defendants, the corporation, under the resolution set out in the judgment.

The warrant was then issued to another constable, one Maurer, who called to his assistance the defendant Murr, and they arrested the plaintiffs, conveyed them to gaol, and kept them there over night, until the \$53.05 was paid to obtain their liberty.

BARRON, Co. J., withdrew the case from the jury and gave judgment in favour of the defendant, Murr, holding that Murr was justified in what he did under sections 15, 16, 17 and 18 of the Criminal Code; that he was not acting with malice or without reasonable and probable cause in obeying the warrant; that the action was not brought within six months; that no notice of action was given to him, and that he was entitled to the protection of sections 1, 13 and 14 of R.S.O. 1897, ch. 88.

As to the defendant corporation, the judge found that the corporation did not institute the proceedings, or undertake to pay any damages suffered by the plaintiffs, but did pass a resolution indemnifying the magistrate against any costs incurred in the proceedings, and that they had no legal right to do so, and such act was *ultra vires*, and that though they might possibly be liable to an action as individuals, they were not liable as a corporation.

He reserved the question of the validity of the conviction and warrant, and the right of the plaintiffs to recover the \$53.05 back, dependent upon that, and held, as against the corporation, that it was not necessary to first quash the conviction in order to recover the \$53.05.

Mabee, K.C., for the plaintiffs, objected to the case being withdrawn from the jury, and contended that it was for the jury

to find whether the corporation instituted the proceedings, and to construe the indemnity resolution.

A subsequent judgment was delivered by the learned county judge, holding that the act, of which the plaintiffs were alleged to be guilty, did not arise from their joint act, but was complete in each one separately: 2 Hawkins' Pleas of the Crown, ch. 25, section 89; and each was by himself or herself a wrongdoer: *Regina v. Sutton* (1877), 42 U.C.R. 220; that the conviction was informal and irregular, and that money paid under it, under protest, as in this case, could be recovered back: *Pollett v. Hoppe* (1847), 17 L.J.C.P. 76; but as only \$30 of the amount paid by the plaintiffs had been paid to the defendant corporation by the magistrate, he gave judgment against the corporation for that amount with costs on the Division Court scale, with a set-off of costs of the defence on the County Court scale.

From these judgments the plaintiffs appealed.

TORONTO, December 5, 1901.

J. P. Mabee, K.C., for the appeal, contended that the conviction was bad on its face, and the warrant would not have been issued but for the interference of the corporation by its resolution; that their conduct caused its issue and the arrest which followed, and which took place with undue harshness; that what they did was outside the whole scope of their powers, and that Murr interfered in the arrest, although he was not mentioned in the warrant, nor was it handed to him to execute, but to another constable, and that Murr, having laid the information, or being the informer, was disqualified from acting in the execution of the warrant, and so was not entitled to the ordinary protection afforded by law to constables as public officers: *Ex p. McCleave* (1900), 35 New Bruns. R. 100; *Eastman v. Reid* (1850), 6 U.C.R. 611; *McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 Can. S.C.R. 531; *Abrath v. The North Eastern R.W. Co.* (1886), 11 App. Cas. 247; *Morgan v. Brown* (1836), 4 A. & E. 515; *Griffith v. Harries* (1837), 2 M. & W. 35, and sections 21, 31, 33 and 511 of the Code.

G. G. McPherson, K.C., contra, contended that Murr laid the information in performance of his duty; that the warrant was addressed to all constables and peace officers generally, and was handed to Maurer for execution, who took Murr with him to assist, as there were three persons to be arrested; that there was no undue force used with two of them, but the third resisted and had to be compelled to go; that the constable was protected in acting on the warrant: Code, section 21; that the action was not brought within six months, and no notice was given: R.S.O. 1897, ch. 88, sections 1, 13 and 14; that the resolution of the corporation did not cause the arrest, nor were they in any way answerable for what took place; that a municipal corporation differed from a joint stock corporation, in that no action was maintainable against a municipal corporation for malicious prosecution; and that their resolution was *ultra vires*: Dillon on Municipal Corporations, 4th ed., 1183; *Eaves v. Nesbitt* (1901), 1 O.L.R. 244.

TORONTO, February 13, 1902.

BOYD, C.:—So far as the defendant, Murr, is concerned, the action is for enforcing an illegal warrant of arrest and therein assaulting the plaintiffs.

Upon the facts, it appears that a conviction was made against the defendants, under section 511 of the Code, for interfering with and spoiling a spring of water at the side of the highway, but that, as drawn up, it was bad, because of awarding one fine against the three: *Regina v. Sutton*, 42 U.C.R., at p. 224.

Murr laid the information in conjunction with one Hishon, who was interested in the preservation of the spring, and it appears in several places in the evidence, that he was a constable and peace officer of the neighbourhood.

The warrant was drawn up as usual, addressed "To all or any of the constables," etc., and was, according to one statement in the evidence, handed to Murr for execution; according to another statement, it was handed to one Maurer, also a constable,

to be executed. At all events, one called in the other to assist in the execution, as there were three persons to be arrested and conveyed to jail, and both could lawfully act under the general direction of the warrant.

It is alleged in the pleadings, and clearly proved in the evidence, that the defendant was a constable and acted as such in the execution of this warrant, and he is entitled to all the protection extended by law to public officers of the peace.

The warrant being bad on its face, as following the conviction, section 21 of the Code applies, which exempts the persons acting under it from all criminal responsibility, but this leaves him liable to a civil action.

But in regard to a civil action he, as constable, is protected by R.S.O. 1897, ch. 88, sections 1 (2), 13 and 14, which are pleaded, and by virtue of which he is exculpated.

This action was not brought within six months of the matter complained of, nor has any notice of action been given. See also Code, sections 975, 976 and 980.

Ex p. McCleave, 35 New Bruns. R. 100; 5 Can. Cr. Cas. 115, cited to establish that the defendant, being the informer, was disqualified to act as the executive officer to enforce the warrant, and thereby lost the privilege or protection of his office, does not justify such a conclusion in this case.

Three judges held under the provisions of the Canada Temperance Act, that the prosecutor, being personally liable for costs if he failed, was not competent to execute a search warrant or an order for the destruction of the liquor. The Chief Justice and another judge dissented, and another, a sixth judge, gave no opinion.

The decision is contrary to *Regina v. Heffernan* (1887), 13 O.R. 616, and rests on the special legislation and provisions as to costs in the particular statute, and, even if well decided, ought not to be read as applicable to the ordinary course of criminal procedure.

Here the defendant was associated with another in the institution of the complaint, and he was associated with another in

the enforcement of the warrant, and I see no reason why he should lose the advantage of his position as a public officer.

This disposes of the case as to the individual defendant, for there is no statement on the record, and no issue joined, as to any undue or excessive violence having been used, though it is sought to evolve that cause of complaint by reason of some evidence of a slight scuffle having arisen at the time of the arrest.

It remains to deal with the corporation defendants, who are made parties because, it is said, the magistrate was induced to issue the warrant in question on the strength of a resolution passed by the council to indemnify him as to costs.

The action is for maliciously enforcing an invalid conviction.

The facts are these: The magistrate had proceeded *ex parte* to convict, after the parties had been summoned and had made default. The legal difficulty was then raised, that the proceedings were nugatory, because the summons served had no seal.

The magistrate took the advice of the county attorney on this, and upon that advice he issued the warrant. He says, "If I had been advised that the summons was not legal, I would not have issued the warrant" (*i.e.*, to arrest).

It was stated to the council that the magistrate would not hand the warrant to the constable till a resolution was passed as to costs, and as soon as the resolution was passed, the warrant was handed by the magistrate to the constable.

The resolution is in these words: "It was unanimously resolved by the council of Ellice that the corporation of the township will stand and be responsible for any costs, that may be caused by the suit of Mr. Murr vs. Chas. Gaul (and others), re enforcing the judgment of Robert Armstrong, magistrate, in the matter of said suit."

There is no proof that the conviction or warrant was brought before the council, or that there was any knowledge of its illegality on the ground of joint fine, and no proof that the council was acting other than *bonâ fide* for the protection of the spring on the highway. There is no evidence of malice.

But assume that imputed knowledge of the invalid conviction and warrant is to be attributed to the corporation, then their

resolution to put it in force, or to pay any costs of putting it in force, was *ultra vires*. It transcends the statutory powers of any municipal corporation to award funds for illegal purposes. The element of public character in this municipality forbids the council passing such a resolution so as to bind the corporation, *i.e.*, all the inhabitants.

Neither is the corporation, as such, bound to make good such costs, nor is the corporation, as such, liable in damages for any action taken by the magistrate in consequence of such unwarrantable resolution.

This act of the council does not bind the corporation, and the legal consequences of any illegal conduct, arising from it, are to be visited, not on the municipality, but upon the offending members who passed the resolution: *Cornell v. The Town of Guilford* (1845), 1 Denio N.Y. 510; *Pocock v. The Corporation of the City of Toronto* (1896), 27 O.R. 635, at p. 639; and *Ferguson v. Earl of Kinnoull* (1842), 1 Bell, Sch. App. 662; *The Mayor, etc., of the Municipal Borough of Tynemouth v. The Attorney-General*, [1899], A.C. 293.

Respondeat superior, on which doctrine, *McSorley v. The Mayor, etc., of the City of St. John*, 6 S.C.R. 531, proceeded, has no application to this controversy, for the justice of the peace and the constables were acting as Dominion officials in the enforcement of criminal law.

I think that the correct result is that the action was rightly dismissed, and the judgment is affirmed with costs.

FERGUSON, J.:—I concur in the above judgment.

ROBERTSON, J., also concurred.

Judgment affirmed.

Note: Constable informant—Whether disqualified from executing process in his own case.

In *R. v. Heffernan* (1887), 13 Ont. R. 616, a case under the Canada Temperance Act, it was held by Robertson, J., of the Ontario High Court of Justice, that the fact that the search warrant for liquors was executed by the constable who was the informer was not a ground for quashing the

Note—(Continued): Constable informants.

conviction. The learned judge said (p. 625): "However objectionable it may be in the abstract to allow an informer to execute the process which is issued on his information, it does not strike me that the facts in this case would afford grounds for quashing the conviction. The informer here was the chief of police, and it was to him that the search warrant was directed. He is in a purely official and public capacity, and in the execution of the search warrant he had no private or pecuniary interest to serve; and I should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible, and there appears to be no complaint as to the manner of his executing this warrant; nor do I think this case is parallel to that of the sheriff acting when he is himself personally interested in the matter involved, to which the process of the court refers. Sections 101 and 102 of the Act direct by whom penalties may be sued for and whose duty it shall be to bring prosecutions for the recovery of such penalties; and the Collector of Inland Revenue for the official division in which the offence is committed is the person whose duty it is declared to be to act, provided that in so acting he is not subjected 'to any undue measure of responsibility in the premises.' But the section also states that such prosecution can be brought 'by or in the name of any person.' No case was cited in support of the objection, and I have not met with any which would warrant me in giving effect to it": 13 Ont. R. 626.

In *Ex parte McCleave* (1900), 5 Can. Cr. Cas. 115, it was held by the Supreme Court of New Brunswick that as the prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, is personally liable for costs in the event of the prosecution failing, a constable who is also the prosecutor is disqualified on the ground of interest from executing either a search warrant or an order for the destruction of the liquor in respect of which the information was laid. Hanington, J., delivered the opinion of the majority of the Court, Landry and Van Wart, JJ., agreeing with him, and Tuck, C.J., and McLeod, J., dissenting.

Hanington, J., commented on the decision of Robertson, J., in *R. v. Heffernan*, 13 O.R. 616, as follows:—"That learned Judge does there hold that, though objectionable, the informer, if a police officer, may execute his own warrants of search and destruction. His reasons for holding such a case to be outside the principles which at common law prevent officers, such as sheriffs, etc., from executing their own processes or those obtained by their kin, are that he, acting in an official and public capacity, had no private or pecuniary interest to serve, and he should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible. I can not agree that any such supposed guarantee is enough to allow any prosecutor (personally liable to costs if his prosecution fails, and for damages if his conduct is illegal, either of

Note—(Continued): Constable informants.

which facts would disqualify any high sheriff) to say that they do not disqualify an officer of the police of the city. If he, as such public officer, undertakes the prosecution, he could have no difficulty in getting a sheriff or constable to execute the warrants and orders, and I think he should do so. If, as Mr. Justice Robertson says, it is objectionable, it is well, I think, to adhere to the common law principles, which, if followed, would leave nothing to be objected to. Under a warrant of this description the executive officer has great powers, even to breaking outside doors, has to exercise discretion, and to determine and adjudge that he has found the liquor complained of. Any official clothed with such powers and duties should, I think, be entirely free from interest, bias or prejudice, which he in law can not be when he is interested in fact, executing his own warrants and orders."

[SUPREME COURT OF THE NORTH WEST TERRITORIES.]

BEFORE RICHARDSON, J.

THE KING v. McLEOD.

Liquor License Ordinance—Appeal—Affidavit of merits—Jurisdiction—N.W.T. Ordinances 1900, ch. 32, sec. 22—Cr. Code, secs. 880, 881.

1. The conditions, practice and procedure, in respect of appeals from summary convictions made under the laws enacted by the Legislative Assembly are those which that Assembly has prescribed, and an appeal cannot be heard unless all the statutory requirements imposed as conditions of the right of appeal have been complied with.
2. Where the Legislative Assembly have provided that the provisions of Part LVIII. of the Criminal Code shall apply to such appeals and has also enacted that no appeal shall lie unless an affidavit of merits be filed, the latter must be taken to be a condition precedent of the appeal in addition to those contained in Code sec. 880, notwithstanding the provision of Code sec. 881 that, when the requirements of Part LVIII. have been complied with, the court shall try the appeal.

DECIDED: July 2, 1901.

THIS was an application for leave to enter an appeal from a conviction by a justice of the peace under the Liquor License Ordinance. The facts and arguments sufficiently appear from the judgment.

T. C. Johnstone, K.C., for the appellant.

Horace Harvey, Deputy Attorney-General, contra.

REGINA, N.W.T., July 2, 1901.

RICHARDSON, J. :—At the opening of the June sittings of the Supreme Court held at Regina on June 18th, 1901, Mr. Johnstone, representing the above-named Annie McLeod, moved to have an appeal entered from the conviction of her, the said Annie McLeod, made on the 25th April, 1901, by Wm. Trant, Esq., one of His Majesty's justices of the peace in and for the North-West Territories, whereby the said Annie McLeod was convicted of having, on the 20th April, 1901, at Regina, on her premises known as the Windsor Hotel, being a place where liquor may be sold, unlawfully sold liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes being produced by the vendee or his agent as required by law.

For the purpose of effecting the entry of such appeal notice of intention to appeal was produced, dated 30th April, 1901, with proof of service on that day upon the prosecutor and the convicting justice. There was an affidavit of the said Annie McLeod, sworn on 18th June, 1901, before N. Mackenzie, Esq., a commissioner for taking oaths, and not before the convicting justice, asserting that on the evening of Saturday the 20th April, 1901, a few minutes before 7 o'clock, she went to her bartender in the bar-room of the said hotel, and gave him explicit instructions to close the said bar at 7 o'clock of the said day; that said bar was closed at the said hour on the said day, and was not afterwards opened with her knowledge or consent; and if opened it was so opened contrary to her express and explicit instructions and against her wishes. It was also shewn that a deposit of \$150 had been paid into Court by order of the convicting justice under section 888, sub-section (c) of the Criminal Code.

Mr. Harvey, Deputy Attorney-General, representing the prosecution, objected to the granting of the application on the

ground that by section 22 of chapter 32 of Ordinances of 1900, amending the Liquor License Ordinance, "no appeal shall lie from a conviction for any violation or contravention of any of the provisions of the Ordinance, unless the party appealing shall within the time limited for giving notice of such appeal make an affidavit," before the justice who tried the cause, "that he did not by himself or his agent, servant or employee, or any other person, with his knowledge or consent, commit the offence charged in the information"; and negating the charge in the terms used in the information; and further negating the commission of the offence by the agent, servant, or employee of the accused, or any other person, with his knowledge or consent; "which affidavit shall be transmitted with the conviction to the Court to which the appeal is given"; and that no such affidavit is shewn have been made or returned to this Court.

In support of the application, Mr. Johnstone urged that the section 22 cited by Mr. Harvey applies only when the appellant has a defence on the merits, and not where the right is one of law; that this section 22 is inconsistent with section 881 of the Criminal Code, and therefore, not binding upon the intended appellant; and that as the provisions of section 880 of the Criminal Code have been complied with, the appeal should be entered.

The conviction in this case is for an offence created by the Liquor License Ordinance passed by the Legislative Assembly of the Territories in respect of a matter within its legislative authority, and a right of appeal is given by chapter 32, Consolidated Ordinances, section 8, which enacts that except it be otherwise specially provided, all the provisions of Part LVIII. of the Criminal Code shall apply to all the proceedings before justices of the peace under or by virtue of any ordinance. It was competent to the Legislative Assembly in providing for appeals from convictions under the authority of its own ordinances, to impose such conditions and prescribe such practice and procedure in respect thereof as it considered proper; and of course to vary the same from time to time. Instead of enacting an independent code of practice, it chose to adopt the practice and procedure under the Criminal Code, but that did not preclude it from thereafter

prescribing new conditions or otherwise altering the practice and procedure so adopted.

Under section 840 of the Criminal Code, the provisions of Part LVIII. apply only to offences and matters over which the Parliament of Canada has legislative authority, and for which a person charged therewith is liable to be summarily convicted by a justice of the peace. But for chapter 32, section 8, Consolidated Ordinances, Part LVIII. of the Code would not apply to an offence like the present against a Territorial Ordinance not punishable under any Dominion Statute.

In 1900 the Legislative Assembly chose to amend the conditions under which an appeal from a conviction for any violation of the Liquor License Ordinance could be entered, by requiring the making of an affidavit by the appellant as above referred to, and specially providing that unless such condition is complied with no appeal shall lie.

As stated in Paley on Convictions, p. 282, a right of appeal must be given by express enactment and cannot be extended to cases not distinctly enumerated, and (p. 292) all the statutory requirements must be accurately fulfilled.

The appellant here has admittedly not complied with the conditions prescribed by the Ordinance of 1900, and in consequence her appeal cannot lie, and she is not entitled to have the same entered or heard.

Since arriving at this conclusion the case of *The Queen v. Bigelow*, 4 Can. Cr. Cas. 337; 31 Can. S.C.R. 128, has come under my notice. The Nova Scotia Liquor License Act, 1895, restricts the right to a writ of *certiorari* in proceedings instituted for breach of that Act, to those cases only where the party applying therefor makes an affidavit similar in terms to that prescribed by section 22, Ordinance 32 of 1900. The Supreme Court of Canada affirmed a judgment of the Nova Scotia Supreme Court holding that in the absence of the affidavit thus provided for, an application made for a writ of *certiorari* by Bigelow, who had been convicted before a justice of the peace of an offence created by that Act, must be rejected.

Leave refused.

[YORK COUNTY GENERAL SESSIONS—ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, COUNTY JUDGE AND
CHAIRMAN OF SESSIONS.

THE KING v. CHILCOTT.

Fortune telling—Written application—Contract negating intent to deceive—Palmistry and clairvoyance—Cr. Code, sec. 396.

1. Where on a prosecution for undertaking to tell fortunes, it appears that the prediction of the future for which payment was made was expressly stipulated to be only a delineation made pursuant to rules laid down in published works on palmistry, etc., an acquittal should be directed, as the contract negatives any intention to deceive.

DECIDED : March 24, 1902.

THE prisoners were indicted under the Criminal Code, sec. 396, for having undertaken to tell fortunes.

It appeared in evidence that parties who desired the services of the fortune teller (afterwards called as witnesses), went to the defendants (who had assumed the name of "The Royal English Gypsies"), and, on payment, in each case, of 25 cents, certain disclosures relating to their lives in the future were conveyed to them by the defendants, as the result of an inspection of their hands, or, as the method is generally called, palmistry.

Before anything was done, each individual was asked to sign, and thereupon did sign, the following:—

"Notice to Consultants. The Royal English Gypsies hereby warn all who desire to consult them that their delineations of character, circumstances, or past life, or their attempts (if any) to define, predict, or foreshadow the future, are made according to the rules laid down in the text books on Palmistry, Astrology, Psychometry, Clairvoyance or other arts and sciences studied by them as modified and supplemented by their own judgment, experience and personal gifts. They will act in good faith, and emphatically disavow any intention to deceive or impose upon those who consult them (which would constitute a legal offence), and their statements must be accepted as given on these condi-

tions, and on this understanding; and persons who cannot accept such statements as made in good faith, and without any intention of deception or imposition, are requested not to consult them.

To the Royal English Gypsies: Having read the foregoing notice to Consultants, I hereby express my desire to consult you on the understanding and conditions therein stated, and to pay your usual fees.

Date..... Name.....
Time of day..... Address....."

TORONTO, March 24, 1902.

Dewart, K.C., for the Crown.

Du Vernet and Vickers, for prisoners.

MCDougall, Co. J., *Held*, that, by force of the above specified engagement, no undertaking to tell fortunes as contemplated by section 396 of the Criminal Code had been given by the prisoners. An acquittal was therefore directed. *R. v. Marcott*, 4 Can. Cr. Cas. 437; 2 O.L.R. 105, referred to.

Prisoners acquitted.

Note: It was held by the Ontario Court of Appeal in *R. v. Marcott* (1901), 4 Can. Cr. Cas. 437, that, to uphold a conviction under sec. 396 of the Code, there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent, in so asserting or representing, of deluding and defrauding others.

The signature to such a contract as is set forth in *Chilcott's case*, *supra*, may in certain cases be obtained by delusion and fraud, and, when so obtained, the document would only tend to incriminate the accused. It is submitted that it should have been left to the jury to find whether the alleged contract was real or a mere pretence in evasion of the law; and to say whether the alleged sciences of palmistry, etc., and the representation of "experience" and "personal gifts" were or were not parts of a deceptive scheme for obtaining money from the public.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE AND RITCHIE, JJ.

THE KING v. BRENNAN.

THE KING v. KENNEDY.

Unlawful possession of "still" or rectifying apparatus—Possession "in any place," meaning of—Inland Revenue Act, R.S.C. 1886, c. 34—Stat. Canada 1897, c. 19, s. 6, and 1898, c. 27, s. 3.

1. Under sec. 159 of the Inland Revenue Act, R.S.C. 1886, c. 34, as amended 1898, c. 27, it is an offence to have possession of a "still" without the notice or registration provided by the Act, even though such possession be that of a carrier only.
2. The phrase "in any place" used in sub-section (e) of sec. 159 of the Inland Revenue Act, is equivalent to the word "anywhere," and the context does not limit its meaning to distilleries or places used as distilleries.

ARGUED: February 26, 1902.

DECIDED: March 5, 1902.

Motions under chapter 181 of the Revised Statutes of Nova Scotia, 1900, "Of Securing the Liberty of the Subject," on the return of an order in the nature of a writ of *habeas corpus* (made by Weatherbe, J., returnable before the Court in Banco), for the discharge from custody of the defendants, both prisoners in the common jail at Halifax, under the following circumstances:—

The prisoner Brennan was on the 18th day of February, 1902, convicted under Part LVIII. of "The Criminal Code, 1892," before the Stipendiary Magistrate of the City of Halifax, "that he the said Abner N. Brennan, did, in the said City of Halifax, on the 11th day of February, 1902, without having a license under the Inland Revenue Act, then in force, unlawfully have in his possession, in the City of Halifax aforesaid, a still suitable for the manufacture of spirits, without having given notice thereof as required by said Act, the said still not being registered under section 125 of the said Act, Henry Hugh Grant being the informant and prosecutor," and was adjudged to for-

feit and pay the sum of \$300, and to pay to the said prosecutor \$1.50 for his costs in that behalf; and if the said several sums were not paid forthwith, that he be imprisoned in the said common jail at Halifax, in the City of Halifax, for the term of six months, unless the said several sums and the costs and expenses of conveying said Brennan to jail were sooner paid. The jailer returned a warrant reciting the above conviction and containing the said direction.

The motion was made on the ground that the conviction and warrant disclosed no offence as the proper construction of sections 121 (e), 158, 159 (e), (as amended by Acts (D.), 1898, chapter 27, section 3), of "The Inland Revenue Act," required that the offence for which the prisoner was convicted and committed could only be committed in some "place" set aside or used as a distillery, and that no such place being stated in the conviction, the same was void.

The prisoner Kennedy was also convicted on "summary conviction" on the 17th of February, A.D., 1902, before the Stipendiary Magistrate of the City of Halifax "for that he, the said Frederick Kennedy, did in the said City of Halifax, on the 11th day of February, A.D., 1902, without having a license under the Inland Revenue Act, then in force, unlawfully have in his possession in the City of Halifax a still suitable for the manufacture of spirits, without having given notice thereof as required by the said Act, the said still not being registered under section 125 of the said Act," and was adjudged to forfeit and pay the sum of \$300, and in default of payment forthwith to be imprisoned in the common jail at Halifax for the term of six months unless the said sum and the costs and charges of conveying him to jail (fixed at 10 cents) were sooner paid.

The motion for this prisoner's discharge was based on the following grounds:—

1. That the jurisdiction of the Stipendiary Magistrate, under section 113 of the Act, was limited to cases where the penalty or forfeiture was not in excess of \$500, whereas reading sections 124, 159 and 160 together, a penalty or forfeiture could be in excess of that amount.

2. That while the conviction (being admittedly good otherwise than as complained of) adjudged the prisoner to be imprisoned until the fine and the costs and expenses of conveying him to jail were paid, the warrant directed the jailor to detain him for the term of six months "unless the said sums for penalty, costs and charges of conveying him to said jail, the costs and charges of so conveying to jail being 10 cents, shall be sooner paid unto you, the said keeper."

3. That section 159 (*g*), as amended by Acts (D.), 1897, chapter 19, section 6, having made the offence for which the prisoner was convicted and committed, a *misdemeanor*, it was not competent for the Dominion Parliament to enact that such an offence could be tried summarily without the intervention of a jury.

It was agreed, with the permission of the Court, between counsel representing the prisoners and the prosecution, that the grounds urged by counsel on behalf of both prisoners should, as far as possible, be considered by the Court as applying in common to both applications.

HALIFAX, N.S., February 26th, 1902.

John J. Power, for the prisoner Brennan.

W. F. O'Connor, for the prisoner Kennedy.

Frederick F. Mathers, for the prosecutor and the Attorney-General of Canada.

HALIFAX, N.S., March 5, 1902.

WEATHERBE, J. (dissenting):—

Formerly any person was liable for having in his possession without a license and without having given notice, etc., a still "in any place" or premises owned by him or under his control. That was all.

Section 159 (*e*) of the Act was changed by amendment by making such person without license—that is, without license to carry on a distillery—liable in two cases: 1st, for such posses-

sion "in any place," and, 2nd, he is made liable if the still is found on his premises or place, whether such place is in his possession or not. It is urged that from this change it becomes obvious that the object was simply to make an unlicensed distiller, *who had not given the notice required by the Act*, liable if a still was found on his own place or premises, though the premises were not in his possession, and also to make liable such person without license, and who had not given such notice, if found in his possession in some other place.

The amendment gives the Act a wider operation simply in this, that formerly it was necessary if a still was found on the place or premises belonging to a person who was not in possession, he is, *primâ facie*, to be considered in possession.

That is a much wider operation, no doubt, but beyond that extension I think no reason has been offered which is not in violation of the rules of construction, and it is admitted that there is no authority for further enlarging the meaning of the Act.

The words "place," "any place," and "whose place," in the original and amended clauses are used six times. In five cases it is confined to instances where "place" in a limited sense, such as premises, is admittedly intended.

The familiar rule that unless there is something in the context requiring a different construction, the word must be intended to have the same interpretation, I should think, applies. No one has pointed out anything whatever in the context to require a change. Nothing, therefore, could justify us as a tribunal dealing with the construction of a highly penal statute unable to explain these reasons urged on behalf of the prisoner in treating this word in that limited sense in which the draughtsman was using it in five other contiguous places in the very same clause and sentence.

If we are to give the word a different meaning, what is proposed as the meaning? It is suggested that we treat the words "in any place" as if they were eliminated from the Act.

The draughtsman of the amended clause, it will be seen, on

examining the original and amended clauses, found the words "in any place" in a different part of the original clause, and in the amended clause he inserted them where they are now found. One would have supposed that, according to first principles, unless he intended the words to have some meaning, he would have left them out altogether. And yet if the prisoner is to be retained on the charge in the conviction, such a thing can only happen by ignoring the words which were added in the Act as now amended.

If the still in question was found in prisoner's possession, it was not difficult to describe in some way in what place that happened. It was found in his possession *no where*. And if proof were offered before the justice that it was found in the Province, and no further proof could be extracted from a witness, such a case for conviction would be absurd.

It was suggested that "anywhere" can be read for "in any place," thus: "Every person who . . . has in his possession such still *anywhere*." Even so one cannot conceive of a trial where the identical place would not be disclosed. What can possibly be the reason for concealing in a warrant or conviction what must always be disclosed on the trial? This would seem like torturing the Act against a prisoner.

There is another argument on behalf of the prisoner to be dealt with. The clause 159 we are now construing says that:—

"Everyone who . . . without having a license . . . has in his possession in any place any still, etc. . . . without having given notice thereof as required by this Act. . . ."

This clearly shews what "place" is intended to mean, viz., such "place" as one might propose to carry on the work of distilling in.

Moreover, what is meant by the notice? This clearly is confined to an importer or maker. It is admitted that the proprietors of the railway or steamer carrying a still cannot obtain a license to carry the same. So it must, one would suppose, be admitted that "place" was not intended to cover a steamer or railway truck. In other words, the law was not intended, since

it has not said so, to render an innocent carrier liable. There is little necessity for rendering the open carriage of stills illegal, because the maker who has a license only to make, and not to carry, is obliged to report to the nearest inspector, in every case, for whom he is making, residence of person for whom he is making, and material of which he is making, before the manufacture. And so also has the importer to report. No one could point out in the Act the word "place" as having any other than a limited meaning.

The justice has inserted the words "City of Halifax," as if that was within the meaning. We must understand, therefore, that he had no proof before him where or "in what place," the still was. And it is admitted that if the prisoner is liable, it is for the same reason that if he was carrying the still on a truck "without a license," he would be liable, though it is admitted no license is required by the truckman to carry stills, and certainly no license can under the Act be issued or provided for such purpose.

It is not disputed, indeed, that "City of Halifax" is no more appropriate in the place where it is found than would be "Province of Nova Scotia," which manifests the absurdity of such a construction of the Act. It was, however, suggested that "place" might include the length of distance between here and Montreal and render the carrier liable.

I think it is safe to assume that if the Legislature intended to make the carrier liable without a license, they would have said so, and provided a license for him. What they have done is to require a report beforehand to the nearest inspector of all stills likely to be carried.

With reference to the suggestion that the words "in any place," which were inserted by the amendment, being now considered as struck out, or never written into the Act, this, it must be observed, would render any one whomsoever liable if in possession of a still, even innocently carrying it. It is clear the maker can get no license to carry it. Neither could the distiller who paid for making it. His license does not cover this

work. It is not so pretended. Therefore the effect of such an extraordinary and absolutely unnecessary and voluntary interpretation would prevent all distilling unless the distiller were to get a license to manufacture everything necessary, with all its parts, upon the premises, which, I suppose, would be impracticable.

I submit, though that was actually suggested, that the Act is in no sense prohibitory. Nor even is it intended, I suppose, to curtail the manufacture of liquors so as to increase the revenue from importations. "A distillery," as defined by the Act, is "any *place*. . . . where any *still*. . . . is made or kept." This, of course, is not the dictionary of popular meaning, but the meaning for the purpose of the Act, and, of course, if the "City of Halifax" is the "*place*" contemplated by the Act, Halifax is a brewery for the purposes of the Act, which is ridiculous.

It was not pointed out at the argument, but I observe that in the Act, while there is no license provided for *to have in possession* a still for making spirits, there is for a chemical still, but even under this it could not be carried far—only within a mile of a city, town or village—and the same license will permit the holder to use the instrument within those limits.

This is very suggestive as to the justice supposing "the place" meant a city. Here is a place, though not so denominated, extending in all directions a mile beyond the limits of a city.

It was contended that sections 133 to 136 and 142 to 159 controlled the case. I have looked in vain to see why sections providing for capacity and list of vessels and colours of pipes and conduits, and as to the manner of marking casks can be of assistance. Section 136 refers to the "tails of worms." Section 142 refers to "locking up apparatus."

Then, lastly, because section 159 (g) provides for seizing stills found in the hands of unlicensed persons or in unlicensed places, this shews that stills cannot be lawfully carried. This sub-section is dealing entirely with the concealment of stills and the finding of them. Even if this bore the construction relied on, the prosecution is not under (g).

I think that the necessity of resorting to language so remote in intention as that before us to define the meaning of "place" to retain the prisoner in jail only shews how clear is his right to discharge.

Fletcher v. Calthorp, 6 Q.B. 880, where there was a statute authorizing a summary conviction of any person "who should by night enter or be on any land, whether open or enclosed, with any gun for the purpose of taking or destroying game." Objection was taken to the conviction, that in addition to the words of the statute which were in the conviction, there should have been language added to shew that the intention was to take game in that place. Lord Chief Justice Denman delivered the elaborate judgment of the Court after full and able argument. That great judge thought the place where a criminal act was intended to be prohibited so important that, even though not required by the Act to be stated, it was essential that it should be set forth in the conviction. The decision shews further that though the prohibition of entry for destruction of game was generally on any land, open or enclosed, it was necessary to define in the conviction what particular place was entered, and to set forth in the conviction that *there*—in that place—the destruction took place.

Two very important questions respecting the jurisdiction of the justice were argued at length, to both of which I should have to attend but for the view I am obliged to take.

The curious circumstance that the legislature has specially made this (the only exception to the crimes dealt with in Dominion legislation) a *misdemeanor* triable by a magistrate, and that under the clause of the British North America Act respecting civil rights, the Parliament cannot deprive the accused of a jury, is a question possibly deserving some attention.

RITCHIE, J.:—

THE KING V. BRENNAN.

The prisoner was tried before the Stipendiary Magistrate of the City of Halifax, and convicted of unlawfully having in his

possession in the City of Halifax a still suitable for the manufacture of spirits, without having given notice as required by The Inland Revenue Act, the said still not being registered.

A motion is now made for his discharge from custody on the ground that no specific place where he had the possession of the still was mentioned in the conviction.

The conviction was made under section 159, sub-section (e), of The Inland Revenue Act, as amended by chapter 27 of the Acts of 1898.

This section, as it originally stood, was as follows:—

“Everyone who, without having a license under this Act, then in force, has in his possession any such still, etc., in any place or premises owned by him or under his control, without having given notice thereof, etc., is guilty, etc.” The amendment is, “has in his possession, any such still, etc., without having given notice, etc.”

Under the original Act the accused could only be found guilty if he had the still in his possession *in some place owned by him or under his control*. The amendment gives the Act a much wider operation, and does not confine it to cases where the place is owned or controlled by the accused. It is, in my opinion, intended to cover all cases of actual or constructive possession, no matter where the still is, the words “at any place” in the amended Act being equivalent to “anywhere.”

The gist of the offence is not—having possession of the still in any particular place, but—*having possession of it ANYWHERE, OR AT ALL*.

The intention of the Act is, as I understand it, to prevent any unauthorized person from having possession of a still, etc., in any place, at any time, or in any capacity (including that of carrier). See sections 127, 133 to 136, 142, 159, sub-section (g). and particularly the latter part of section 159, by which all stills, etc., that are found in the possession of any unlicensed person are declared forfeited to the Crown.

It is clear, I think, that under this provision, stills, etc., in the possession of a carrier, could be seized and forfeited if there was no license authorizing his possession.

The cases cited on behalf of the prisoner seem to me inapplicable.

In *Fletcher v. Calthorp*, 6 Q.B. 880, the gist of the offence was not entering the land with a net, *but the intent of taking game*. It was admitted that a conviction in that case could only be obtained *on evidence of intent to kill game on the land the accused entered*, and no doubt it was necessary to state in the conviction that the intent was *to take game THERE*.

In *Snow v. Hill*, 14 Q.B.D. 588, the offence was not betting in any place, *but keeping a place for the purpose of betting with persons resorting thereto*, and the Court held, no doubt rightly, that there must be some place kept, etc., by the accused for the purpose of betting with the persons resorting thereto, and that evidence that he was walking around a field betting with other persons who were present, was not sufficient to bring the case within the purview of the Act.

Any penalty recoverable under section 160 must, I think, be the subject of other proceedings, and in prosecutions such as that under consideration the Court which tried it could not enforce that penalty.

The fact that a subsequent proceeding could be taken for another penalty, if the Crown wished it, does not affect the jurisdiction of the Magistrate to try the case before him. The application for discharge should be refused.

MCDONALD, C.J., concurred with RITCHIE, J.

Brennan's application refused.

RITCHIE, J.:—

THE KING v. KENNEDY.

The decision given in the case of *The King v. Brennan* (*supra*), equally applies to this case.

As regards the objections to the warrant of committal, it being admitted that the conviction was good, sections 886 and 896 of the Criminal Code are applicable, and the objections

taken afford in my opinion no ground for the prisoner's discharge.

Calling the offence a misdemeanor would not affect the jurisdiction of the Magistrate, which is clearly given by section 113, and the right of the Dominion Legislature to create such a Court has been settled by the Supreme Court of Canada in *Attorney-General v. Flint*, 16 Can. S.C.R. 707.

MCDONALD, C.J.:—

I concur in the opinion just read by Mr. Justice RITCHIE.

Application refused.

[RECORDER'S COURT, CITY OF MONTREAL.]

BEFORE MR. R. S. WEIR, RECORDER.

THE KING v. LAVOIE.

Public meeting—Disturbance—R.S.Q., Arts. 2946, 2964—R.S.C. 1886, ch. 152—Cr. Code, sec. 173.

1. Sec. 173 of the Criminal Code, which declares it an offence to disturb, interrupt or disquiet any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, does not apply to a meeting of electors called by one of the candidates during a municipal election.

MONTREAL, February 11, 1902.

MR. RECORDER WEIR:—The accused is charged with having, January 29, 1902, unlawfully and wilfully disturbed by rude behaviour and by making noise an assemblage of persons met for a social purpose, to wit, the holding of a meeting in a hall in Bonsecours Street.

The evidence shews that a meeting of the electors of the East Ward, in the city of Montreal, was called in the interest of M. Levy, a candidate for the representation of the ward in

the City Council. During the progress of the meeting, at the date and place above mentioned, one of the speakers was interrupted by the prisoner, who exclaimed: "Tu as menti; ce n'est pas vrai." Remonstrated with by the complainant, he desisted for a short time, but soon resumed his interruption. There then ensued a scuffle between the two, and the meeting was discontinued.

The arrest is professedly based upon Art. 173 of the Crim. Code, which makes it an offence to disturb, interrupt or disquiet any assemblage met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

I do not think the accused disturbed any meeting of the character mentioned in this article, which is not intended for the preservation of order at political or municipal meetings. Solemnity certainly is not expected at such gatherings, where a certain freedom in the way of question and answer, repartee and rejoinder, expressions of dissent or approval, have been permitted and even expected, time out of mind. I do not say whether or not the defendant's conduct was a fair exercise of his rights as an elector, but I do not see how he can be condemned under the article cited, and upon which the complaint is based. It is essential to distinguish the character of public meetings in deciding what constitutes an interruption, for what is orderly at one meeting may be disorderly at another. A man might indulge, for example, in an amount of applause at a political meeting that would be very grateful to the ears of a candidate, but would constitute a serious interruption if indulged in at meetings of the kind mentioned in Art. 173.

Our law, moreover, makes ample provision elsewhere for the preservation of order at political meetings, and if the preliminary formalities had been observed, a conviction might possibly have been obtained against the accused. The Revised Statutes of the Province, Articles 2946 to 2964, provide for

preserving order not only at such public meetings as are held according to law, *e.g.*, under the Municipal Code, but at any public meeting of the inhabitants of any district, county, city, town, township, ward or parish. Such a meeting may be called by special notice by the mayor or by the sheriff upon the requisition of twelve free-holders or citizens having a right to vote at a provincial election; or it may be called by any two or more justices of the peace upon a like requisition; or, lastly, it may simply be declared by two justices to be a public meeting within the meaning of the section referring to it. Moreover, it is within the power of a single individual fearing a disturbance at a public meeting other than those mentioned, to lodge a sworn information before any justice, whereupon any two justices having local jurisdiction may give public notice thereof; and thereupon all persons in attendance at such meetings are under special protection of law, and the chairman thereof is clothed with special powers to cause the arrest of all disturbers. Moreover, ch. 152 of the Revised Statutes of Canada, entitled "An Act for the preservation of peace at public meetings," has not been repealed (*vide* Appendix to Crim. Code), and is another protective statute that is still available.

Fortunately, the public meetings held in this city and province are, as a rule, most orderly; but the special provisions I have cited should not be forgotten, and if the organizers of political assemblages do not avail themselves of them, they can hardly be surprised if the Court declines to enlarge the obvious limitations of Art. 173. The prisoner is discharged.

Prisoner discharged.

L. A. Lefebvre, for the Crown.

C. Piché, for the accused.

Note: Public meetings—Preserving the peace.

The Act respecting the preservation of peace at public meetings, R.S.C. 1886, chapter 152, which has not been repealed by the Code, enacts as follows:—

(1) Any justice of the peace within whose jurisdiction any public meeting is appointed to be held, may demand, have and take of and from any person attending such meeting, or on his way to attend the same, any

Note:—Continued.

Public meetings—Preserving the peace.

offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession; and every such person who, upon such demand, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any such offensive weapon as aforesaid, is guilty of a misdemeanour, and such justice may thereupon record the refusal of such person to deliver up such weapon, and adjudge him to pay a penalty not exceeding eight dollars,—which penalty shall be levied in like manner as penalties are levied under the *Act respecting summary proceedings before Justices of the Peace*, or such person may be proceeded against by indictment or information, as in other cases of misdemeanour; but such conviction shall not interfere with the power of such justice, or any other justice of the peace, to take such weapon, or cause the same to be taken from such person, without his consent and against his will, by such force as is necessary for that purpose.

(2) Upon reasonable request to any justice of the peace, to whom any such weapon has been peaceably and quietly delivered as aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards, be returned by such justice of the peace to the person from whom the same was received.

(3) No such justice of the peace shall be held liable to return any such weapon, or make good the value thereof, if the same, by unavoidable accident, has been actually destroyed or lost out of the possession of such justice without his wilful default.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J.

THE KING v. YOUNG.

Bawdy house—Definition—Offence of keeping—Occupation by or resort to by more than one female—Cr. Code, secs. 195, 198, 783.

1. A female cannot be convicted of unlawfully keeping a bawdy house, unless it is shewn that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution.

ARGUED: April 24, 1902.

DECIDED: April 24, 1902.

MOTION for a writ of *habeas corpus* on behalf of a woman convicted before a police magistrate of unlawfully keeping a "bawdy house."

George Patterson, for the Crown.

R. A. Bonnar, for the prisoner.

WINNIPEG, April 24, 1902.

KILLAM, C.J.:—There was evidence that the woman was a prostitute and had previously been convicted of keeping a house of ill-fame. It appeared that one man, who was previously unknown to her, went to a house of which she appeared to be in charge, that while he was there another woman called and went out again, after which he had sexual intercourse with the defendant and paid her money therefor. In the same afternoon he returned with another man, when the same thing occurred again. The evidence would probably warrant the inference that the defendant made a business of prostituting herself for hire at the house in question. There was no evidence of the character of the woman visitor or that she went to the house for any such purpose or that any other woman ever did so.

It does not appear to me that, in all this, there was any evidence that the house was a bawdy one.

The point seems settled by the decision in *Singleton v. Ellison*, [1895] 1 Q.B. 607, where Wills, J., said "A brothel is the same thing as a bawdy house. . . . In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It is certainly not applicable to the state of things described by the magistrates in this case, where one woman receives a number of men."

In Wharton's Criminal Law, section 1449, it is said that "the house must be resorted to in common by other women than its keeper, when a woman."

In Bouvier's Law Dict., *tit.* "Bawdy House," it is said "and more than one woman must live or resort there."

This view is supported, also, by the decision in *The State v. Calley*, 104 N.C. 858; 10 S.E. Rep. 455, and by the A. & E. Ency. of Law, vol. 9, p. 520.

Here the only charge was that of keeping a bawdy house, and it was necessary for the prosecutor to prove that the house was

one of that character. There is no question on this application, and there was none before the magistrate, of punishing the woman in any other way or of adopting other measures to suppress her practices.

There being no evidence that the house claimed to have been kept by the defendant was such as comes within the legal meaning of the term "bawdy house," she could not lawfully be convicted of the only offence with which she was charged.

I express no opinion upon the other points raised.

There should be a writ of *habeas corpus*, and, unless the Crown objects, the order may direct the discharge of the defendant.

Writ granted.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF QUEBEC.

BEFORE ANDREWS, J.

THE KING v. MERCIER.

Summary conviction—Certiorari—Power of Superior Court in Province of Quebec over inferior courts—Vagrancy—Public place—Insulting language—Impeding or incommoding passengers—Uncertainty in conviction—Cr. Code, sec. 207.

1. The Superior Court in the Province of Quebec has power over a conviction made by a justice of the peace in a criminal matter.
2. Slandering a person in a restaurant open to the public is not an offence under sec. 207 of the Criminal Code, either as an obstruction to passenger by using insulting language, or as a disturbance incommoding passengers.
3. A restaurant open to the public is not a "public place" within the meaning of Code sec. 207.

DECIDED: November 16, 1901.

One Délima Garneau laid a complaint under Art. 207, Criminal Code, before Elzéar Plamondon, J.P., against one Rose Mercier, charging that the latter had spoken the following words of

her in a public restaurant, addressing the proprietor of the restaurant, Louis Bisson, viz.: “à cause que tu as baisé la femme à Thomas Lagueux.”

Plamondon issued his warrant and caused Rose Mercier to be arrested, convicted her of “vagabondage, suivant l'article 207 du code criminel,” and condemned her in a fine of \$25 and costs or three months' imprisonment.

Thereupon, Rose Mercier, the petitioner, applied for a writ of *certiorari*, alleging that the complaint contained no offence known to the law, and that Plamondon, as a justice of the peace, had no jurisdiction to deal with the case.

QUEBEC, November 16, 1901.

ANDREWS, J.:—

“The Court, having seen and examined the proceedings and evidence of record and heard the parties by counsel upon the merits of the writ of *certiorari* filed in this cause;

“Whereas, by her petition for a writ of *certiorari* and affidavit of circumstances thereto appended, it is alleged and doth appear that on the 22nd September last, the said Délima Garneau, by her written complaint, that day made at Stadacona Village, in the district of Quebec, did, before the said Elzéar Plamondon, charge the said petitioner, Rose Mercier, as follows, to wit: ‘Que Dame Rose Mercier, veuve de Pierre Paquet de Québec, Vendredi, le 20 septembre courant, entre cinq et sept heures de l'après-midi, au restaurant tenu par Thomas Lagueux et Louis Bisson, sur le terrain de la Compagnie d'Exposition de Québec, situé au village Stadacona, a dit à la plaignante, en s'adressant à Louis Bisson qui voulait la faire sortir de son restaurant, “à cause que tu as baisé la femme à Thomas Lagueux”; and by the said petition and affidavit and by the proceedings returned with the writ of *certiorari* issued on the said petition, it doth further appear that on the same complaint, the said Elzéar Plamondon, as a justice of the peace for the said district of Quebec, did issue his warrant and did cause the arrest thereon of the said petitioner

Rose Mercier, and subsequently, to wit: on the 27th of September aforesaid did convict the said Rose Mercier of, to wit: as in the conviction stated: 'Vagabondage suivant l'article 207 du code criminel,' and did condemn her in a fine of \$25 and the costs, or three months' imprisonment,—the whole notwithstanding her plea and protest that the said charge in said complaint made, contained no offence known to the law, and conferred no authority or jurisdiction on the said Elzéar Plamondon to deal with the matter."

Before I read the conclusion to which I have come, I will say this: At the argument, the power of the Superior Court to deal with this judgment was disputed. Firstly, on the ground that, being a judgment of a Court on a criminal complaint (I use the words as used before me at the argument), the Court had no power to meddle with it by *certiorari*; secondly, the conviction was supported on the ground that it was good in law, that the offence charged did in fact constitute disorderly conduct—vagabondage—and warranted the conviction.

As to the contention that the Superior Court cannot meddle with a conviction by a justice of the peace on a penal matter, I am surprised to hear it raised, because ever since my memory runs, the Superior Court has been doing it all the time; and the fact is, that the power of the Superior Court to control all inferior jurisdictions, wherever the liberty of the subject is concerned, is of date long before I was born. It is to be found in the old statutes which were eventually consolidated and incorporated in the Revised Statutes of Quebec, in article 2329, which expressly gives the Superior Court power and control over all courts except the Court of King's Bench. I am referring to this because the point was taken and strenuously argued.

As to the merits of the conviction itself, it will be noticed that the complaint is made by a woman who is not alleged to have been, and, as a matter of fact, was not present at all when the words imputed to the defendant were used. These words were used of her in a restaurant. There is no allegation that anything followed, there is no allegation that thereby anybody was incom-

moded, that any passenger was impeded or that anything resulted. It is simply a mere accusation, a mere charge that the complainant was slandered in a public restaurant, if you will. Well, that is wanting in the essential elements which are required to constitute an offence under the section which is referred to, and which constitutes a loose, idle, and disorderly person, coming within the control of the Code. If the matter had occurred in the street, and if the complainant had been a passenger in the street, it is more than probable that some latitude would have been allowed, and it would have been held that she, as a passenger, was impeded; but under the circumstances, it is impossible for a moment to sustain the conviction.

The judgment is, therefore:—

“Considering that the said complaint of the same Dame Délima Garneau disclosed no facts constituting the said offence of vagabondage, nor any facts of a nature to justify the said arrest or conviction of the said Rose Mercier, and that the said Elzéar Plamondon had no jurisdiction in the premises; the said writ of *certiorari* issued herein is maintained, and the said conviction and all the proceedings therewith connected are hereby declared illegal and are set aside and quashed, with costs against the said Dame Délima Garneau.”

Conviction quashed.

A. Corriveau, for petitioner.

J. A. M. Gagnon, for respondent.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., DUBUC AND BAIN, JJ.

THE KING v. JOHNSON.

Lottery—Advertising lottery scheme—Sale of lottery tickets—Prize dependent upon chance without skill—Illusory condition seeming to involve skill—Condition without probable chance of failure—Device to evade lottery law—Cr. Code sec. 205.

1. Where tickets for a drawing by lot are sold as part of a scheme for the disposal of goods, and the holder of the winning ticket is required by the conditions of the drawing to shoot a turkey at fifty yards in five shots in order to win the prize, such circumstance does not necessarily take the case outside of the lottery sections of the Criminal Code.
2. It is a question for the jury whether such condition was imposed as a contest of skill, or as a mere pretence in evasion of the lottery law.
3. Where the evidence shews that any person could easily comply with the condition and the jury found the advertiser of the scheme guilty of advertising a lottery, the verdict will be supported as, in effect, finding that there was no real element of skill involved in the condition.

ARGUED: February 8, 1902.

DECIDED: February 15, 1902.

CROWN case reserved. The accused was tried under section 205 of The Criminal Code, 1892, relating to lotteries before Richards, J., and a jury at the Fall Assizes of 1900 and convicted. The following is a copy of a case stated by Richards, J., for the consideration of the Full Court as to whether, under the circumstances, the accused had been properly convicted:—

“At a sitting of the Court of Queen's Bench for Manitoba, held at Winnipeg for the trial of criminal matters and proceedings for the Eastern Judicial District of Manitoba, commencing on the sixth day of November, one thousand nine hundred, the accused James Johnson was indicted and tried before me on the charges contained in an indictment containing two counts, which counts are as follows:—

‘1. That James Johnson, at the City of Winnipeg, in the Province of Manitoba, on the twentieth and other days of October in the year of our Lord one thousand nine hundred, did unlawfully

cause to be advertised and published a certain proposal, scheme or plan for disposing of a certain horse, buggy and harness by lot.

2. And the jurors aforesaid do further present that James Johnson, at the City of Winnipeg in the Province of Manitoba, on the twentieth and other days of October in the year of our Lord one thousand nine hundred, unlawfully sold, bartered exchanged or otherwise disposed of certain lots, cards or tickets as a means or device for giving, selling or disposing of a certain horse, buggy and harness by lot.'

The evidence shewed that the accused James Johnson, at the times of the committing of the alleged crimes referred to in said counts, carried on in a building on Main Street in Winnipeg, under the name of the Bankrupt Stock Buying Company, the business of selling clothing, underwear, boots and shoes and other goods, and that, with a view to increasing his sales in the said business, he caused to be advertised and published an advertisement or notice of his said business in a newspaper published in the City of Winnipeg, in which advertisement or notice, after referring to certain goods which he had upon the said premises for sale and the price at which they were to be sold, the following words and figures were so advertised and published, that is to say:—

'GIGANTIC FREE GIFT.

During this sale we shall give to each purchaser of \$5.00 and upwards a ticket entitling to participate in the free gifts of a horse, buggy and harness. Value \$300.00.

To be given away on December 24th. The holder of the winning ticket, if he shoots a certain turkey at 50 yards in five shots, gets the horse, buggy and harness. In the case of a lady she may name a substitute to shoot for her.'

The evidence further shewed that before and at the times mentioned in the said counts, the accused did give or cause to be given to each purchaser from him or his servants at his said place of business of goods of the value of \$5.00 and upwards a

coupon or ticket in the words and figures following, that is to say:—

‘This coupon entitles the holder to participate in the drawing for horse, buggy and harness given away by the Bankrupt Stock Buying Co., Winnipeg. Drawing to take place December 24th, 1900.’

And that a very large number of such coupons or tickets were so given to purchasers as aforesaid.

The coupons or tickets so given away were numbered, each having upon it a number which was not borne by any other such coupon or ticket, and by which it could be distinguished from every other such coupon or ticket so given to a purchaser. As each such ticket or coupon was given to a purchaser a duplicate ticket or coupon bearing the same number as that so given was deposited in a certain valise or satchel kept by the accused upon his said business premises, the intention of the accused being that, in order to ascertain which ticket or coupon should be the winning one, a duplicate ticket or coupon should be drawn by chance from the said duplicates so deposited, and that, of the tickets or coupons so delivered to purchasers, that one which corresponded in number with the duplicate so drawn by chance from said satchel or valise should be the winning one, and that the holder of such winning ticket should then become the owner of the horse, buggy and harness referred to in said advertisement, provided he could shoot a turkey at fifty yards’ distance in five shots, or, if a lady, provided any substitute she might name could shoot such turkey under the same conditions.

The evidence further shewed that, at the said times of the committing of said alleged crimes and at the times when the accused so advertised or published the above-mentioned notice and gave to purchasers as aforesaid the said coupons or tickets, the accused had, upon the premises connected with the said building in which he carried on such business as aforesaid, a certain horse and a certain buggy and a certain harness which he represented to purchasers of goods at his said place of business to be the identical horse, buggy and harness referred to in above

quoted part of the so published advertisement or notice, and in respect of which there was to take place the drawing by which one of the holders of such tickets or coupons should become the winner of such horse, buggy and harness upon the condition aforesaid.

The jury found the accused guilty upon both counts of the indictment.

At the request of counsel for the accused I reserved this case for the opinion of this Court, and released the accused upon his own recognizance to appear for sentence when called upon to do so.

The question to be considered is:

Was the accused, under the circumstances, properly convicted of the offences charged in the indictment?"

WINNIPEG, February 8, 1902.

George Patterson, for the Crown. The case comes under section 205 of the Code. Where the transaction is one of skill, or which may be so, it is not against the Act, but here no skill was required: *Reg. v. Dodds*, 4 O.R. 393; *Reg. v. Jamieson*, 7 O.R. 149; *Reg. v. Parker*, 9 Man. R. 203; *Reg. v. Lorrain*, 28 O.R. 123, 2 *Can. Cr. Cas.* 144.

No one appeared for the accused.

WINNIPEG, February 15, 1902.

The judgment of the Court was delivered by

KILLAM, C.J.:—The accused was indicted and convicted under section 205 of The Criminal Code, 1892, for having unlawfully caused to be advertised and published a proposal, scheme or plan for disposing of a horse, buggy and harness by lot; and also for having unlawfully disposed of lots, cards or tickets as a means or device for disposing of a horse, etc., by lot.

The *modus operandi* advertised and practiced was that each purchaser from the accused of goods to a certain amount was given a ticket, and upon a drawing by chance among the holders

of such tickets the winner was to get the horse, buggy and harness if he should shoot a turkey at a distance of fifty yards in five shots; a lady winner could choose a substitute to shoot.

The case states that the evidence shewed that any person could easily shoot the turkey under the circumstances. The question is whether the accused was properly convicted.

Upon the close of the argument I felt no doubt as to the judgment to be given; but as the accused was not represented and one member of the Court was not wholly satisfied, we reserved our decision.

It appears to me that it was a question for the jury whether the interposition of the shooting was intended as a real contest or as a device for covering up a scheme to dispose of the property by lot, and upon the evidence they were justified in finding as they did.

I would affirm the conviction.

Conviction affirmed.

Note: *Lottery offences—Cr. Code, sec. 205.*

In an Ontario case the complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea, a gold watch, a diamond ring, or \$20 in money, he paid \$1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents and received another can, which also contained an article of small value; he handed this can back also, paid another 50 cents and received another can which also contained an article of small value. It was held that the object really sought for, and for the chance of obtaining which the money was paid was one of the three prizes named; and that the transaction constituted an offence. *R. v. Freeman* (1889), 18 Ont. R. 524.

But the offer of prizes to the nearest guesser of the number of beans contained in a jar exhibited to view is not a lottery, as it is a matter of judgment or skill and not of chance. *R. v. Dodds* (1884), 4 O.R. 390.

And where a shopkeeper placed in his shop window a jar containing a number of buttons of different sizes, and advertised a prize of a pony and cart, which he exhibited in his window to the person who should guess the number nearest to the number of buttons in the jar; stipulating that the successful one should buy a certain amount of his goods; this was held not to be a "mode of chance" for the disposal of property within the meaning of the Lottery Act, as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort. *R. v. Jamieson* (1884), 7 O.R. 149.

Note:—Continued.

Lottery offences—Cr. Code sec. 205.

The sale of lottery tickets is an offence, whether made for profit or not.
R. v. Parker, 9 Man. R. 203.

In the case of a newspaper sold with coupons to be filled up by purchasers with the names of the winning horses in a horse race and the reward of a money prize for the correct guesses, it is a question of fact to be decided whether the money received was paid in consideration of a promise to pay a prize on the event of the race or was only the ordinary price of the newspaper. *R. v. Stoddart*, 70 L.J.Q.B. 189. And the sale of *Stoddart v. Sagar*, [1895] 2 Q.B. 474, 18 Cox C.C. 165; *Caminada v. Hulton*, extra coupons at a fixed price is a fact to be taken into consideration *Ibid*; 17 Cox C.C. 307.

An offer of a money prize by a newspaper coupon scheme under which the readers were asked to predict the number of registered births and deaths in a certain district during a certain period, was held not to constitute a lottery. *Hall v. Cox*, [1899] 1 Q.B. 198.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE AND RITCHIE, JJ.,
GRAHAM, E.J., AND MEAGHER, J.

THE KING v. BEAGAN (No. 1).

Summary conviction—Certiorari—Adjudication on facts involving the merits, conclusive—General jurisdiction over subject matter—Collateral facts—Canada Temperance Act—Cr. Code, secs. 889, 890.

1. Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject matter, the adjudication involved in the merits of the case, on the facts as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable on certiorari.

ARGUED: January 27, 1902.

DECIDED: April 7, 1902.

MOTION on notice to the prosecutor to set aside a conviction made by a stipendiary magistrate in and for the Town of Spring Hill, in the County of Cumberland, on June 18th, 1901, whereby Lizzie Beagan, the defendant, was convicted of having kept for sale intoxicating liquor between the 27th day of May, 1901, and the 7th day of June, 1901, in the Town of Spring Hill, in the County of Cumberland, in her premises, contrary to the provisions of the second part of the Canada Temperance Act.

The motion was made on the following grounds:—

1. Because there was not a scintilla of evidence before said magistrate to justify said conviction.
2. Because there was no evidence whatever that said defendant kept intoxicating liquor for sale at said Town of Spring Hill between the dates in the information.

HALIFAX, N.S., January 27, 1902.

John J. Power, for the defendant.

T. Sherman Rogers, *contra*. for the prosecutor.

HALIFAX, N.S., April 7, 1902.

MEAGHER, J., delivered the judgment of the Court.

The only objection urged in this case is the want of evidence to warrant the conviction. In that particular this case is governed by *The Queen v. Walsh* (1897), 29 N.S.R. 521, and *The Queen v. Stevens* (1898), 31 N.S.R. 124, which did no more than follow a great many English cases on the subject. In *The Queen v. Sailing Ship Troop Company* (1899), 29 Can. S.C.R. 673, Mr. Justice King, who gave the judgment of the Court, said:—

“It is settled, even in cases where no restraint is imposed by the Legislature upon review by *certiorari*, that an adjudication by a tribunal having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen’s Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. . . .

“A marked distinction exists between the merits of the case and points collateral to the merits upon which the limit to jurisdiction depends. In the former it is conceived that where by statute the adjudication is final, no mere error of the tribunal, whether as to law or fact involved in such determination can suffice to make the adjudication open to review on *certiorari*.”

In the present instance the statute imposes a restraint upon a review by *certiorari*, and the case is therefore all the stronger. The reasoning of the Court in the case last mentioned fits this case exactly, and consequently the motion must be refused. The order for the *certiorari* will be discharged with costs, including any costs incurred on the motion before the Master and upon the *certiorari*. The defendant will also pay the costs upon the present application. The papers will be remitted to the magistrate for

such further proceedings as may be necessary or proper in the premises.

MCDONALD, C.J., WEATHERBE and RITCHIE, JJ., and GRAHAM, E.J., concurred.

Motion refused with costs.

Note: See the next case, *R. v. Beagan* (No. 2).

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE MCDONALD, C.J., WEATHERBE AND RITCHIE, J.J.,
GRAHAM, E.J., AND MEAGHER, J.

THE KING v. BEAGAN (No. 2).

Summary conviction—Fine—Distress and imprisonment in default—Costs of distress and of conveying to gaol—Non-inclusion in minute of adjudication—Variance between the minute and the conviction—Cr. Code, sec. 872 (a)—Code forms WW and FFF.

1. The costs of distress and of conveying to gaol are obligatory where a summary conviction imposes a fine and awards distress and imprisonment in default of distress, and therefore the omission of any reference to such costs in the minute of adjudication will not invalidate the formal conviction which includes them.

ARGUED: January 27, 1902.

DECIDED: April 7, 1902.

Motion on notice to the prosecutor to set aside a conviction made by a stipendiary magistrate in and for the County of Cumberland on June 1st, 1901, whereby Lizzie Beagan, the defendant, was convicted of having unlawfully sold between the 27th day of February, 1901, and the 27th day of May, 1901, at the Town of Spring Hill, in the County of Cumberland, intoxicating liquor, contrary to the provisions of the second part of the Canada Temperance Act.

The motion was made on the following grounds:—

1. That the record of conviction made herein does not agree with the minute of conviction upon which it is based, the record providing for the costs and charges of conveying to jail, while this is not provided for in said minute.

2. That the summons, information, minute of conviction and record of conviction are not, nor are any of them, in accordance with the forms in such cases provided by statute.

HALIFAX, N.S., January 27, 1902.

John J. Power, for the defendant.

T. Sherman Rogers, for the prosecutor, *contra*.

HALIFAX, April 7, 1902.

MEAGHER, J., delivered the judgment of the Court.

Only two objections were urged against the conviction, namely:—

1. That the record of conviction did not agree with the minute of conviction upon which it is based, the record providing for the costs and charges of conveying to jail, while that was not provided for in the minute; and

2. That the summons, information, minute of conviction and record of conviction were not, nor was any of them, in accordance with the forms provided for in such cases.

The minute of conviction at one time played an important part in this Court and in the Courts of New Brunswick and Ontario, but for some time it has rarely been heard of in this Court. For my part, I thought it ceased to be material, especially in cases like the present, where the magistrate who made it also made the conviction, and the conviction does not impose a penalty greater than that authorized by the Statute and was made for an offence against one of its provisions.

Where these conditions concur (and it was not contended that they did not in the present case), this Court is by the express

words of section 117 of the Canada Temperance Act deprived of the power to determine that the conviction is insufficient or invalid, whether there is or is not a mistake as to costs; or whether the minute of conviction does or does not refer to the costs complained of.

See as to this the judgment of the Court in *The Queen v. Malcolm McDonald* (1894), 26 N.S.R. 404, beginning with the second paragraph on page 406 and ending with the citation of *Jones v. Williams*, 36 L.T.N.S. 559, on page 407. The English and Ontario cases cited or referred to in the foregoing passages cannot well be regarded otherwise than as conclusive on that subject.

In *The Queen v. Vantassel*, decided in 1894, but not reported until 1901, 34 N.S.R. 79; 5 Can. Cr. Cas. 128, 133, it is held by the Court (Weatherbe, J., Graham, E.J., and Meagher, J.), affirming the decision of Townshend, J., at Chambers, that it was not necessary for the Magistrate to insert the provision as to costs of the distress and conveyance to jail in the minute, because the statute fixed that, and the Magistrate had no discretion to adjudicate in regard to it, or power to deal with it, and, further, that if the provision as to costs was properly set out in the conviction, its insertion in the minute was unnecessary and therefore immaterial.

The above case, which we were properly reminded of by the defendant's counsel, is directly in point and governs the present.

The second ground did not appear to me to be very seriously urged, but if so, it is not well founded. Defendant's counsel left nothing unsaid which could help his client, but in the light of authority and the express provisions of the statute we cannot do otherwise than refuse the motion. The same order will be granted in this as in the other motion between the same parties disposed of to-day. [*R. v. Beagan* (No. 1,) *ante*.]

MCDONALD, C.J., WEATHERBE and RITCHIE, JJ., and GRAHAM, E.J., concurred.

Motion refused with costs.

Note: *Variance between minute of adjudication and the conviction.*

In *The Queen v. McDonald* (1894), 26 N.S.R. 402, Mr. Justice Meagher (at pp. 406, 407) said :—

“It was also contended that the minute of conviction was defective. I do not attach any importance to a defect in that part of the proceedings. Indeed, I think the statute [the Nova Scotia Liquor License Act of 1890] does not permit me, in this instance, to pay the slightest attention to it, when there is before me, as I conceive, a conviction from which it can be understood that it was made for an offence against some provision of the Act. Section 96 of the principal Act provides that a conviction shall not be held insufficient or invalid . . . provided it can be understood from it that it was made for an offence against some provision of the Act and that an appropriate penalty has been applied. The case comes within that section and the defects, if any, in the minute are not to be regarded.”

In *Regina v. Smith*, 46 U.C.Q.B. 444, Osler, J., said :—

“The third objection is that the original memorandum of conviction differs materially from the subsequent conviction returned to the clerk of the peace, and does not provide for the imprisonment of the defendant in default of payment. I can only take notice of the conviction which has been returned with the certiorari, which appears to be in all respects regular and sufficient in form. If the penalty appears to be properly ascertained by the conviction, the Court will not enquire when it was fixed, for if determined at any time before the conviction was formally drawn up and returned that is sufficient.” See *Regina v. Richardson*, 20 Ont. R. 514.

In *Chaney v. Payne*, 1 Q.B. 822, Denman, Ch. J., said :—

“The cases of *Rex v. Baker*, 1 East 186; *Rex v. Allen*, 15 East 333; *Basten v. Carew*, 3 B. & C. 649; *Rex v. Justices of Huntington*, 5 D. & R. 588, established clearly that magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction, or drawn up in a formal manner as the conviction itself; but that they are at liberty, when called upon by appeal to return the conviction to quarter sessions or by certiorari into this Court, to draw up and return a more formal conviction, correcting any errors which may have existed in that first drawn up, provided the latter conviction be according to the truth and facts of the case as proved before the magistrate. By allowing this to be done the public are protected against the evil of a failure of justice for defect of form when the facts are well proved; and the magistrates are protected from being harassed by vexatious actions when they have done what justice and the merits of the case required, but have inadvertently made some slips in the form of the document drawn up.”

See also *Jones v. Williams*, 36 L.T.N.S. 559.

Mr. Justice Graham in *The Queen v. McDonald*, supra, concurred in the disposition of the case made by Meagher, and Townshend, JJ. (the latter judge dealing with the case wholly on another ground), and said (page 409) :

“With regard to the memorandum of conviction, the memorandum seems to involve the sentence, the amount of the penalty, and imprison-

Note:—Continued.

Variance between minute of adjudication and the conviction.

ment in default. I take it that the 'imprisonment' refers to the imprisonment which will ensue on non-payment of the penalty. I do not dissent on this point from the opinion of the majority of the Court, but I have great doubt as to the sufficiency of the memorandum. While a conviction may be amended, it cannot be amended in a material part, such as the sentence or adjudication. After the adjudication is once made I do not think that a new one can be incorporated in the conviction."

In *Jones v. Williams* (1877), 36 L.T.N.S. 558, a case was stated by three justices of the peace for the opinion of the Common Pleas Division. Two of the justices had convicted Williams of trespassing in pursuit of game contrary to the Game Act. One Roberts was afterwards charged with a like offence under similar circumstances and was tried before the three justices. Two of the justices acquitted Roberts, one of them being the justice who had not heard the Williams case, the dissenting justice being in favour of convicting Roberts and having participated in the conviction of Williams. The majority so disposing of Roberts' case also directed a reversal of the decision in Williams' case which was mixed up with it. The question reserved was whether the two justices were justified in reversing the first judgment against Williams without the concurrence of the other justice. Mr. Justice Grove said:—

"There was, in the first instance, a verbal conviction against Williams, which was not formally drawn up; and in consequence there remained, in my opinion, a *locus penitentie*. That being so, the convicting magistrates changed their minds. It may therefore be said that there was no conviction, but, if there had been, the subsequent proceedings would have been irregular. Whether the magistrates have now power to direct a new trial or not is a question upon which I have some doubt. At any rate the conviction cannot stand."

Mr. Justice Lindley in the same case said (page 560):—

"Of the two magistrates who were in favour of dismissing the case against Williams, one only had heard the evidence, whilst one magistrate who had heard it was in favour of upholding the conviction. No conviction, however, was drawn up, and therefore the proceedings may be said to have come to nothing. The bench changed their opinion of the case, and they could not now be compelled by mandamus to record a conviction. Their action was not perhaps an acquittal, but it certainly did not amount to a conviction; it may be considered as only a part hearing."

In *Regina v. Richardson* (1891), 20 Ont. R. 514, the defendant was convicted under the Ontario Liquor License Act for permitting spirituous liquors to be drank in his hotel contrary to the statute. The minute of adjudication improperly provided for distress in default of payment of the fine and costs imposed, such not being authorized by the statute, but the conviction drawn up and returned under a writ of certiorari omitted the provision for distress. MacMahon, J., held that the conviction need not follow the minute in that particular. He said:—

Note:—Continued.

Variance between minute of adjudication and the conviction.

"In *Regina v. Hartley* (20 Ont. R. 481) the question of the validity of a former conviction not in accordance with the adjudication was fully considered ; and on the authority of *Jones v. Williams*, 36 L.T.N.S. 559, it was held, that until the formal conviction was drawn up there remained to the magistrates a *locus penitentiae* in which they might change their minute. See also *Regina v. Smith*, 46 U.C.R. p. 442 ; *Regina v. Bennett*, 3 O.R. 45, referred to in *Regina v. Hartley*, 20 O. R. 481. In *Regina v. Hartley* the minute of conviction drawn up contained a provision for distress, which the magistrates had no power to insert ; and it was held that it did not prevent a formal conviction being drawn up omitting the provision as to distress. In that judgment *Regina v. Brady*, 12 O.R. 358, 363, and *Regina v. Higgins*, 18 O.R. 148, are considered ; and so far as they are in conflict with the judgment then being delivered, the Court was of opinion that they should not be followed.

[WENTWORTH COUNTY GENERAL SESSIONS, ONTARIO.]

BEFORE HIS HONOUR COLIN G. SNIDER, COUNTY JUDGE.

THE KING v. BASKETT.

Evidence under commission—Witness resident out of Canada but temporarily therein—Application by accused—Proof that evidence material—Cr. Code, sec. 683.

1. An order may be made under Code sec. 683 for taking in Canada, under commission, the evidence of a material witness who ordinarily resides out of Canada, but who is temporarily within the jurisdiction and about to return to his own country.

DECIDED: June 10, 1902.

Henry Baskett, the accused, a resident of the United States, was arrested at Hamilton, Ont., on a charge of pocket picking at the Hamilton races, and upon the preliminary enquiry was committed for trial. He elected to be tried by a jury, and the trial would therefore come on before the Court of General Sessions. Before the sittings of that court the race meeting ended, and two of the prisoner's witnesses, also residents of the United

States attending the races, were about to leave Canada to return to the United States, and declined to remain in Hamilton for the purpose of giving evidence on behalf of the prisoner.

This application was made under section 683 of the Criminal Code, by the prisoner's counsel, to take the evidence of these two witnesses under commission before their departure.

In its support were read affidavits made by the witnesses, stating that they were residents of the United States, that they were unable to remain for the trial, that they could give material evidence, stating shortly the facts which their testimony would establish, and that they were leaving for Buffalo, and that it was impossible for them to return for the trial.

Section 683 of the Code provides that "Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any Superior Court, or the judge of a County Court having criminal jurisdiction, that any person who *resides out of Canada* is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence upon oath, of such person."

J. L. Counsell, for the prisoner.

J. Crerar, K.C., for the Crown, *contra*.

HAMILTON, June 10, 1902.

SNIDER, Co. J., held that the order should be granted, as it would be a great hardship if the prisoner were to be deprived of the evidence of the two witnesses. An order was made that a commission issue out of the Court of General Sessions of the Peace for the County of Wentworth, to a special commissioner thereby appointed, to take the examination *viva voce* of the two witnesses, and that the examination take place before the commissioner at his office one hour after service of a copy of the order on the County Crown Attorney.

Order for commission.

[VANCOUVER COUNTY COURT, BRITISH COLUMBIA.]

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

THE KING v. AH YIN (No. 1).

Appeal from summary conviction—Requisites of notice of appeal—Describing the offence—Playing in common gaming house—Looking on in common gaming house—Cr. Code secs. 199, 880, 982—Code form NNN.

1. A notice of appeal from a summary conviction must state the name of the appellant, the intent to appeal, the nature of the conviction appealed against, and the sittings of the court at which the appeal will be brought on.
2. A notice of appeal purporting to be from a conviction for "looking on" while another person was playing in a common gaming house is not a good notice of appeal from a conviction for "playing" in a common gaming house.

VANCOUVER, October 13, 1902.

BOLE, Co. J.:—This is an appeal from a conviction made by the police magistrate of Vancouver, whereby appellant Mah Gin was convicted under sec. 199 of the Code of playing in a common gaming house, but the notice of appeal sets out that he was convicted of looking on while another was playing in a common gaming house, and the learned counsel for respondent object that the notice is not such as will give jurisdiction to try the appeal. It is true that so long as the appeal is similar to the form provided in the statute it is a compliance therewith, but its office is to inform the respondent that some particular conviction is appealed against, and care should be taken that they cannot be misled on this subject, and therefore the names of the appellants, the intent to appeal, the sessions to which the appeal is to be made, as well as the nature of the conviction itself, should be contained in the notice. Notices, however, will not be critically construed, and if they substantially give the respondents the requisite information they will, apart from statutory provision, be held sufficient. All the statutory conditions must be accurately fulfilled. Paley, 7th ed., page 291. Code form NNN. after the words "convicted of having"

says "here state the offence as in the conviction . . . as correctly as possible." And *Spice v. Bacon*, 2 Ex. D. 463, seems to indicate how far the Court can go to relieve against a formal error.

In *Davies v. Kennedy*, Irish Rep. 3 Equity 31, 69, the Master of the Rolls observed when a statute like this (relating to the registration of judgments) directs certain matters to be stated in a document although the Court may be satisfied that the object for which any particular statement is required might be equally well attained some other way, it cannot speculate on that or inquire into the object intended with any view to allowing an equivalent, but it may, and ought to inquire into the object intended with another view, viz.: to ascertain whether what is stated is or is not what the Act requires.

Can I say this notice fulfils the statutory conditions?

See also *R. v. Middlesex*, 12 L.J.M.C. 59. Again, *R. v. Boulton*, 4 A. & E. 507, decides that the Court can adjudicate only on the matter stated in the notice of appeal; see also *Cragg v. Lamarsh*, 4 Can. Cr. Cas. 246; *Rex v. Durham*, 55 J.P. 277.

I think that the appeal has not been lodged in due form and in compliance with the requirements of the Code, and therefore must dismiss the appeal.

I reserve the question of costs for further consideration.

Appeal quashed.

Note: *Defects in notices of appeal affecting jurisdiction.*

The King v. Boulton (1836) 4 A. & E. 498, was a proceeding under the Game Act which authorized the imposition of certain penalties, and in default of payment the imprisonment of the person convicted. It also provided that the party convicted might appeal to the Sessions, giving notice to the complainant of the cause and matter of appeal, and that no conviction should be quashed for want of form. A party who had been summarily convicted thereunder gave notice of appeal, stating several grounds of appeal on the merits, and concluding with a statement that on the trial of the appeal he would insist on all other causes, matters and things which he could or lawfully might do. The sessions, notwithstanding

Note—Continued.

Defects in notices of appeal affecting jurisdiction.

the limitation of the statute, ordered that the conviction should be quashed for want of form in that the conviction failed to provide for imprisonment in default of payment; and the Court did not go into the merits alleged in the notice of appeal. On the order of the sessions being removed into the King's Bench it was set aside on the ground that the sessions had no power to quash the conviction on the ground that it failed to provide for imprisonment in default of payment, even assuming that it was not a mere defect of form which the statute cured, but a defect in substance, as no notice of that ground had been given in the notice of appeal. Lord Denman, C.J., said:

"Here the convicted party has appealed and given a regular notice. Then what were the *cause and matter of appeal* stated in the notice? Three objections were stated, all going directly to the merits. Those objections were the matter upon which the sessions were to adjudicate. They were to try the merits, but they have set aside the question as to these and decided that the conviction was bad in form. The notice could not refer to objections merely on the face of the conviction; for a conviction is seldom drawn till the time of the sessions; and this was probably never seen by the parties before that time. The justices being, as it were, impannelled to try the merits of the appeal have proceeded to try something else. If the alleged defect was mere form the statute cures it and precludes them from interfering; if it was an objection in substance to the jurisdiction and was well founded, then, although the sessions had confirmed the conviction, no man could have justified the putting it in force; either the conviction was good or nothing could have been done under it."

Williams, J., in the same case, said:

"The appellant in his notice expressly took grounds which went to the merits only. They were the "matter" of the appeal. It is true that the conviction as drawn up was not within his reach when he was obliged to give his notice, but if the objection arising upon it went to the jurisdiction, then at all events the conviction would not be available. If it fell short of impugning the jurisdiction it was merely matter of form, and defects in form are cured by the statute."

Where a time is limited by statute for giving notice of appeal and notice is not given until after the time has elapsed, the objection is fatal although the appeal had been called and adjourned at the request of counsel on both sides to suit their convenience. The failure to give the notice in due time excludes the jurisdiction and could not be waived by the adjournment. *The Queen v. Justices of Middlesex* (1843) 12 L.J.M.C. 59; *The King v. Justices of Oxfordshire*, 1 Mau. & Selw. 446; *The King v. Justices of Yorkshire*, 5 B. & Ad. 667.

R. v. Durham Justices (1891) 55 J.P. 277, referred to in the judgment *supra*, merely decides that where by statute the Sessions Court is made the exclusive tribunal to decide as to the sufficiency of a notice of appeal, no

Note—Continued.*Defects in notices of appeal affecting jurisdiction.*

certiorari will be granted to review its decision in respect thereof. The report of the case does not warrant an assumption that the Court of Queen's Bench agreed with the decision of the sessions that a statement in the notice of appeal that there was no evidence to warrant a conviction was not a statement of the subject matter involved.

See also the next case, *R. v. Ah Yin* (No. 2).

[COUNTY COURT OF VANCOUVER, B.C.]

BEFORE HIS HONOUR, W. NORMAN BOLE, COUNTY JUDGE.

THE KING v. AH YIN (No. 2).

Appeal from summary conviction—Entry and prosecution—Dismissal as not lodged in due form—Jurisdiction as to costs—Cr. Code secs. 881, 883, 884.

1. Where an appeal from a summary conviction is entered and prosecuted but is dismissed on the ground that it was not lodged in due form, there is no jurisdiction to award costs against the appellant.
2. Code section 884 only applies where the appellant fails to proceed with his appeal without abandoning it according to law.

VANCOUVER, October 24, 1902.

BOLE, Co. J. :—This appeal is from a conviction made by the police magistrate at Vancouver whereby the defendant was fined \$35 and costs, in default 60 days' imprisonment, for playing an unlawful game in a common gaming house. I held the appeal, by reason of a defect in the notice, was not lodged in due form and dismissed it on that ground, reserving the question of costs which has been since then argued. At common law there was no provision for the payment of costs in criminal cases: Roscoe, *Crim. Evidence*, 11th ed., 223; so they can only be awarded in pursuance of some statutory provision in that behalf.

Section 881 of the Code provides for trial where the appeal has been lodged in due form. Section 883 provides that judgment shall be on the merits with full power to award costs.

Section 884 provides for costs when an appeal is not prosecuted or is abandoned according to law and seems to me, in the absence of some authority on the subject, only to contemplate cases where the appellant fails to proceed with his appeal and has not abandoned it according to law,—thereupon the respondent can appear before the Court to which the appeal was made and upon proof of the notice, whether same be good or bad, and that the appeal has not been abandoned according to law, apply for the costs and charges occasioned by an appeal having been taken and the Court has ample power in its discretion to award the same.

I think section 884 was principally aimed at preventing frivolous appeals, but in the present case the appeal was prosecuted with considerable energy and the appeal was dismissed because it was not lodged in due form, and it does not in my opinion come within the true meaning of section 884 with respect to awarding costs.

Holding this view I feel I have no jurisdiction under the circumstances to award any, so must leave each party to bear his own costs.

No order as to costs

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., BOSSÉ, BLANCHET,
HALL, AND OUMET, JJ.**MAYER v. VAUGHAN (No. 2).**

Post letter—Detention and search of letter carrier by detective officer—Reasonable and probable cause—Right of search—Release by officer without complaint laid—Crim. Code secs. 4, 326.

1. Where a letter-carrier violates the rules of the post office department by failing to enter a letter bearing a non-existent address in the book provided for that purpose, or to return the letter to the post office, there is reasonable and probable cause for detaining and searching him, and an action for damages against the peace officer who effected the arrest is not maintainable in the absence of evidence that the officer had made an improper and illegal use of his authority in the manner in which he effected such detention and search.
2. A letter is a post letter although directed to a fictitious or non-existent address.

Mayer v. Vaughan (No. 1), 5 Can. Cr. Cas. 392, affirmed.

DECIDED: April 29, 1902.

The appeal was from a judgment of the Superior Court, Montreal, Archibald, J., 28 December, 1901, dismissing the appellant's action, by which he claimed \$5,000 damages for an alleged false arrest and search of his person. The judgment of the Court below is reported in 5 Can. Cr. Cas. 392.

MONTREAL, April 29, 1902.

HALL, J.:—It is evident from the declaration in this action that plaintiff was under the impression that his dismissal from his position in the post-office service was due to defendant's successful attempt to convince the post-office authorities that he, plaintiff, had been guilty of stealing post letters; that the decoy letters, the "shadowing," the arrest and search, were all parts of the scheme which defendant had planned, and that

his "*denunciation*" completed the work and induced the department to discharge him; and inasmuch as the decoy letter was not found upon him, and therefore no evidence discovered sufficient for his conviction, he decided to seek indemnity for the loss of his situation in the form of an action of damages against the detective who had planned the scheme and had failed in his attempt to secure proof of his suspicions. It is because of defendant's "*denunciation*" of him that the plaintiff alleges, in section 30 of his declaration, "that he had been left without any employment and is now without any means of supporting himself and his family." "Wherefore he prays for a condemnation for \$5,000, etc." The proof disclosed that this theory upon which plaintiff's action was principally based was entirely erroneous; that it was plaintiff's superior officers who suspected him of being the cause of so many letters disappearing; that it was they who prepared the decoy letters and placed them so that they would come under plaintiff's control, and that it was only then that defendant was called in to perform the ordinary detective work of shadowing plaintiff and endeavoring to procure the evidence of his guilt. He made no denunciation of plaintiff, but only reported to the post-office authorities what he had done and his failure to secure the necessary evidence for plaintiff's conviction. It was the local post-office authorities here who, satisfied, rightly or wrongly, as to plaintiff's conduct, made the report to the Postmaster-General which resulted in plaintiff's dismissal. In the face of the proof, plaintiff's action had to be limited, therefore, to defendant's temporary connection with and responsibility for the plaintiff's arrest, search and release. The defendant says he did not arrest him. Whether or not there was a technical arrest in this case is a matter of some doubt, but, at all events, the forcible dragging through the street of which the declaration gives so vivid an account existed only in plaintiff's imagination. The statement is entirely disproved.

Even if the plaintiff was temporarily arrested, we are all agreed that the defendant and the post-office officials under

whose instructions he was acting, had "reasonable and probable cause" for the course taken by them, and, therefore, no liability in damages can attach to defendant therefor. It only remains to consider whether such liability results from defendant's conduct in searching the plaintiff and in releasing him without submitting a formal charge against him before a magistrate. Upon the first point, we have plaintiff's statement, exaggerated, I believe—as it is proved to have been about the street scene,—that defendant violently stripped off all his clothing and searched every article of it for the missing letter. Against this is the statement of defendant that plaintiff voluntarily offered to be searched, and that no more of his clothing was removed than was necessary for this purpose. Knowing, as plaintiff then did and as we know now, that wherever the letter was, it was not upon his person, it seems very probable that it would have been plaintiff's most natural impulse to offer to be searched, and that defendant's statement that he did do so is more probable than plaintiff's assertion that it was done by violence and against his will. But independently of this contradiction, it appears to me that a right of search would exist under such circumstances, and that if constables were deprived of this right, the conviction for crimes of that character would be almost impossible. If a person's pocket had been picked in a crowd, surely a constable would have the right to search any suspected person whose position or conduct furnished reasonable grounds for such suspicions. Or if one had been victimized by receiving counterfeit money, and pointed out the person from whom he received it, a constable would surely have a right of search to discover if it was accident or if the person thus denounced had more of the same money in his possession. The case of a letter carrier suspected of purloining a post letter is exactly of the same character. In all three of these cases and many others which might be cited, if a constable were obliged to make a formal complaint or even to remove the suspected person to the police station, before a search of his clothing could be made, all the incriminating

evidence would disappear and the ends of justice be thwarted.

Upon the question of a release without a formal complaint, there is more scope for argument. Plaintiff complains that by this course he was deprived of his right to a formal acquittal—a certificate of which would have been a valid answer to any future reflection against him, based on the fact that he had been under arrest upon a charge of stealing a post letter. It is plain from the text books upon the duties of constables that it is their duty to take all arrested persons with the least possible delay before a magistrate.

But this must be intended to apply to cases in which the charge against the prisoner is persisted in, and clearly should not apply to cases in which the charge for any reason is dropped. Suppose the case of a constable having made a mistake in his instructions and arrested the wrong man. It seems absurd to suppose that the charge may not be dropped and the person released. Such would be the procedure, it appears to me, if the evidence expected to be secured proves to be wanting, as in the case of the supposed pickpocket or counterfeiter, or of the accused letter carrier. Of course, if the person thus arrested will not accept his release, and demands to be taken before a magistrate, his wish should be respected, but in the absence of any such demand, the simple act of a constable in thus releasing a person against whom he finds no evidence of guilt, would not of itself suffice, in my opinion, as the basis of a claim for damages. I have been unable to find any precedents exactly in point, but in the case of *Reed v. Cowmeadow & Rudge* (7 C. & P. 821), where a constable had kept a person under arrest until a summons could be prepared and then released him, in order that the summons might be properly served, Parke, J., instructed a jury that such a release did not, by itself, give rise to a valid claim for damage against the constable, but was only to be taken into account, among other circumstances, in determining whether or not the constable was acting in good faith and without malice. In that case the jury found for the defendant, and in the present one I do not think

the plaintiff's release without being taken before a magistrate is a ground for a claim for damage against the constable. The plaintiff made no demand for a trial, and his pretended grievance that he did not have one is clearly an afterthought, and brought forward now to strengthen his chance of recovering damages. It is to be borne in mind, too, that the release took place in the presence of plaintiff's superior officers in the post-office department, the instigators of the whole proceedings, and the persons really responsible, if anyone was, not only for plaintiff's arrest, but for his discharge without a trial. See Vaughan's deposition, p. 5 of respondent's supplementary appendix, line 1. "Not finding it (the letter), he asked me if there was anything else. I said no; and as the post-office officials came into the house, he left."

Under these circumstances, I am of opinion that the judgment dismissing the action should be confirmed.

My colleagues' concurrence in this result, is based, however, on the sole ground that plaintiff's evidence does not establish the allegations of his declaration.

Upon the question of discharge without formulating a complaint, see also *Hackett v. King*, 6 Allen (Mass.), 58, in the same sense.

The following judgment was recorded:—

"Seeing that, by the present action, appellant alleged that he had been in the service of the post-office department as a letter carrier; that defendant, a detective, had accused him of having stolen a letter entrusted to him as such carrier, and had arrested him, and dragged him publicly through the streets, and had taken him to a private house, and stripped off his clothing in search of such letter, which he had not found, and had then discharged him, and further, that defendant had made an accusation against him to the post-office authorities, charging

him with the theft of said letter, and that, in consequence of said accusation, said appellant had been discharged from his position, and had sustained damage to the extent of \$5,000, for which he demanded a condemnation against the defendant;

"Seeing that defendant denied the plaintiff's allegations, and especially denied that he had arrested plaintiff, or dragged him through the streets, but alleged that, in all he had done, he had acted under the direction and authority of plaintiff's superior officers in the post-office department, and that both they and he had just and probable cause for their suspicions that plaintiff had stolen the letter in question, and just and probable cause for the steps taken by them to endeavour to discover said missing letter in plaintiff's possession, and that the search made of plaintiff's clothing was so made at his, said plaintiff's, own suggestion and invitation;

"Considering that the evidence establishes that said defendant, and the post-office officials for whom he was acting, had just and probable cause for their suspicions against plaintiff, and that no liability attaches therefor to said defendant, unless it is proved that he made an improper and illegal use of his authority in his detention and search of said plaintiff; and considering that plaintiff's evidence upon these points is positively contradicted by said defendant, and that the latter's evidence is corroborated in most of its principal respects by that of Madore, the deputy inspector, and Gagnon, the superintendent of the post-office department;

"Considering, therefore, that plaintiff has failed to prove the essential allegations of his declaration, and that it is in evidence that plaintiff lost his position, not by reason of any accusation of said defendant, but upon the report of his, said plaintiff's superior officer in the post-office department;

"Considering, therefore, that in the *dispositif* of the judgment appealed from, dismissing plaintiff's action, there is no error;

“Doth dismiss the present appeal with costs, and doth, for the reasons hereinbefore given, confirm the judgment of the Superior Court.”

Appeal dismissed.

St-Pierre, Pelissier & Wilson, for the appellant.

G. F. O'Halloran, K.C., for the respondent.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE SCOTT, J.

IN RE BONGARD.

Extradition—Application for warrant of apprehension—Jurisdiction—Prerequisites—Laying information in extradition or proving foreign warrant of arrest—Alternative procedure—Foreign warrant must be in full force—Return of not found—Authenticated copy of foreign warrant insufficient—Appearance under irregular warrant no waiver—Extradition Act, R.S.C. 1886, ch. 142, secs. 6, 9, 10.

1. An extradition judge may issue a warrant for apprehension either upon a complaint laid before himself or upon proof of a foreign warrant of arrest, but, in the latter case, the original must be produced and it must appear that it is still in force.
2. An authenticated copy of a foreign bench warrant, and of a return thereto that the accused could not be found within the jurisdiction of the sheriff, is insufficient proof of a warrant outstanding and in full force, unless there be evidence of a valid re-issue of such foreign warrant.
3. An extradition judge has no jurisdiction to issue a warrant for apprehension without an information or complaint laid before him or proof made of a valid outstanding foreign warrant; nor does jurisdiction attach upon the appearance before him of the accused under arrest upon a warrant improperly issued without such requirements having been complied with.

ARGUED: October 16, 1900.

DECIDED: October 19, 1900.

Hearing of an application for extradition.

Section 6, of the Extradition Act, R.S.C. 1886, *ch. 142*, provides as follows:—

“Whenever this Act applies, a Judge may *issue his warrant* for the apprehension of a fugitive on a *foreign warrant* of arrest, or an information or complaint laid before him, and on such evidence, or after such proceedings as in his opinion would, subject to the provisions of this Act, justify the issue of his warrant, if the crime of which the fugitive is accused or alleged to have been convicted, had been committed in Canada.

2. The Judge shall forthwith send a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice.”

CALGARY, October 16, 1900.

C. A. Stuart, for the State of Minnesota.

Hon. J. A. Lougheed, Q.C., for the prisoner.

CALGARY, October 19, 1900.

SCOTT, J.—On the twelfth day of October, inst., upon the application of Mr. Stuart, acting on behalf of the State of Minnesota, I issued a warrant, under The Extradition Act, to the constables of the North-West Mounted Police, directing them to apprehend Gerhard Bongard, and to bring him before me or some other Judge under the Act, to be further dealt with according to law.

Upon the application for the warrant there were produced before me the following documents, viz.:—

1. A duly authenticated copy of an indictment found by the Grand Jury of the county of Carver, in the State of Minnesota, on the 17th day of March last, whereby said Bongard was charged with the crime of wilfully misappropriating and feloniously converting to his own use certain moneys amounting to \$6,450.75, of and belonging to said county, deposited with and

received by him as treasurer of said county, the particulars of said offence being set out in detail in such indictment.

2. A duly authenticated document, purporting to be a copy of a bench warrant issued upon said indictment from the District Court of the 8th Judicial District of said State, on the 15th day of March last, directed to any sheriff of said State, and commanding him forthwith to arrest said Bongard, and bring him before the said Court to answer said indictment. The copy produced shews that the warrant was issued by order of said Court, and was signed by the clerk thereof, and that it bore a seal, but it does not shew that the seal was the seal of the Court from which the warrant issued. Accompanying the copy of warrant was a copy of a return thereto by the Sheriff of Carver county, dated 10th of April last, wherein he returns that said warrant was placed in his hands on 15th March last, that under and by virtue thereof, he had made diligent search for said Bongard, and was unable to find him in said State, and that he believed that said Bongard was without said State, and sought an asylum without said State so that service of said warrant could not be made upon him.

3. Duly authenticated copies of the depositions of certain witnesses taken by and before Francis Cadwell, Judge of said District Court, on the twelfth day of April last.

Under the warrant issued by me, said Bongard was brought before me on 16th day of October instant, when I proceeded to hear the case. Mr. Stuart, on behalf of the State, tendered as evidence the documents above mentioned, and certain other documents in the nature of certificates, authenticating them, and by consent of counsel for Bongard, I received them subject to any objections that might thereafter be raised by him to their admissibility as evidence. Mr. Stuart then called as a witness the Sheriff of Carver county, who made the return above referred to. He identified the prisoner as the person referred to in the bench warrant referred to, and stated that, to his knowledge, Bongard had acted as treasurer of Carver county, and had received money from him as such. His further

evidence, so far as material, was to the effect that he saw Bongard in Carver county on 10th February last, that the next time he saw him was at Olds, Alberta, about the beginning of May last, that about that time Bongard accompanied him from Olds to the city of Chaska, in Carver county, Bongard being then in his custody, that he held Bongard in his custody at Chaska for about fourteen days, until the sittings of the Court, and that he was discharged from his custody at that sittings of the Court.

No further evidence was adduced in support of the application for extradition, nor was there at any time any information, charge, or complaint against Bongard laid before me.

Among the objections taken by counsel for Bongard were the following:—

That there was no foreign warrant produced before me at the time I issued the warrant for the arrest of Bongard, nor was there any information or complaint laid before me at that time, that, therefore, I was not justified in issuing the warrant, and it follows that the proceedings founded upon it are void; that the only document in the nature of a foreign warrant was, at the most, an authenticated copy of such a warrant, and there is no provision made for the production of a copy in lieu of the original; and that the evidence shews that the warrant, of which a copy was produced, was satisfied, the sheriff having taken Bongard into custody under it, and that he was discharged from custody by the Court.

I think there can be no doubt that, by virtue of the Imperial Order in Council of 21st March, 1890 (See Dominion Statutes, 1890, p. xliii), the procedure with respect to the extradition of criminals from the United States is regulated by the provisions of The Extradition Act, R.S.C. ch. 142. Section 6 of that Act provides that a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant, or on an information or complaint laid before him, and on such evidence, and after such proceedings, as in his opinion would, subject to the provisions of the Act, justify the issue of his warrant if the crime.

of which the fugitive is accused or alleged to have been convicted, had been committed in Canada.

It follows from this that, in order to give a Judge jurisdiction to issue a warrant, there must be either a foreign warrant or an information or complaint made before him. There is nothing in the Act to shew that the existence of a foreign warrant may be proved by the production of an authenticated copy, or in any other way than by the production of the original. In fact, sec. 10 of the Act would seem to indicate an intention that the original warrant should be produced, for in addition to expressly providing that copies of depositions or statements, if authenticated in the manner therein prescribed, may be received, it also provides that, if the warrant purports to be signed by a Judge, magistrate, or officer of the foreign state, and is further authenticated in the manner therein prescribed, it may be received in evidence in proceedings under the Act.

The case of *The Queen v. Ganz*, 9 Q.B.D. 93, was relied upon by Mr. Stuart as supporting his contention that a foreign warrant may be proved by the production of a duly authenticated copy. Upon referring to that case, I find that it has no application to the present case, because it is a decision upon the effect of sec. 15 of the Imperial Extradition Act of 1870, which expressly authorizes that mode of proving the warrant.

For the reasons I have stated, I entertain serious doubts whether, in cases where the proceedings are founded upon a foreign warrant, the original must not be produced.

I am, however, of the opinion that the last objection above referred to is well taken, and that it has not been shewn that there is now outstanding any foreign warrant for the apprehension of Bongard. The only foreign warrant of which there is any evidence is shewn to have been returned on 10th April last by the sheriff, in whose hands it was placed for execution. Presumably, it was returned to the Court from which it issued.

It is open to question whether, after having been so returned, it could again be delivered to the same or any other sheriff for

execution. At all events, there is nothing to shew that it was so delivered, or that it was re-issued. It is true that the same sheriff afterwards took Bongard into custody, but it does not appear that it was under the same warrant, and even if such had been shewn, that fact would not be evidence of the validity of the warrant. It would, however, shew that, even if it had been properly re-issued, its force had been spent, as the person whose arrest it directed had been arrested under it, and brought before the Court from which it issued.

It was contended by Mr. Stuart that, under sec. 9 of the Act, I must hear the case in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada; and that if a prisoner charged with such an offence is brought before a justice without any information or complaint having been previously laid, he might then draw up an information or charge against him and proceed to hear it. He relied upon *Regina v. Hughes*, 4 Q.B.D. 614; 14 Cox C.C. 284, in support of his contention. In that case the Court of Crown Cases Reserved appears to have held that a justice would have jurisdiction to hear a charge under those circumstances, and I was at first inclined to the view that by analogy I might pursue the same course under the Act, but upon further consideration of the question, I cannot so hold.

Sub-sec. 2 of sec. 6 of the Act prescribes that forthwith after the issue of the warrant the Judge shall send to the Minister of Justice a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information, or complaint. It thus appears that where the proceedings are founded upon an information or complaint it must be in writing at the time of the issue of the warrant.

The fact that a copy of it must at once be forwarded to the Minister of Justice leads me to conclude that the intention of the Act is that the proceedings under it must be founded upon

either a foreign warrant or on an information, or a complaint in writing, laid before the issue of the warrant.

I direct the discharge of the prisoner.

Prisoner discharged.

Note: The Canadian Extradition Act of 1886.

The Parliament of Canada passed in 1886 "an Act respecting the extradition of fugitive criminals," and thereby made provision for carrying into effect within the Dominion the surrender of fugitive criminals. It thereupon became necessary to abrogate, in so far as Canada was concerned, the Imperial Extradition Acts of 1870 and 1873, and this was done by an Imperial Order-in-Council dated 17th November, 1888, directing that the operation of the Extradition Acts (Imperial), 1870 and 1873, should be suspended within the Dominion of Canada so long as the provisions of the Canadian Act of 1886 should continue in force and no longer.

A supplementary extradition convention was afterwards concluded between Great Britain and the United States of America, dated July 12, 1889, the ratifications of which were exchanged on March 11, 1890 (see 2 Can. Cr. Cas., page 71).

An Imperial Order-in-Council was passed on March 21, 1890, making the Imperial Extradition Acts of 1870 and 1873 generally applicable to such supplementary convention, but with the proviso that their operation should be suspended within the Dominion of Canada "so far as relates to the United States of America and to the said convention, and so long as the provisions of the Canadian Act aforesaid of 1886 continues in force, and no longer." (Imperial Orders-in-Council printed with Canadian Statutes of 1890, page xliii.)

Another supplementary extradition convention was concluded on December 13, 1900, between Great Britain and the United States, the ratifications of which were exchanged on April 22, 1901, the effect of which was to add the following to the list of crimes for which extradition might be granted:—

- (11) Obtaining money, valuable securities or other property, by false pretences.
- (12) Wilful and unlawful destruction or obstruction of railroads which endangers human life.
- (13) Procuring abortion.

An Imperial Order-in-Council dated 26th June, 1901, makes the Imperial Extradition Acts, 1870 to 1895, applicable from and after the 13th day of July, 1901, with a similar proviso to that contained in the Imperial Order-in-Council of 1890, namely, that the operation of the said Imperial Extradition Acts shall be and remain "suspended within the Dominion of Canada so long as an Act of the Parliament of Canada passed in 1886 and entitled 'An Act respecting the Extradition of Fugitive Criminals' shall continue in force there and no longer." (Imperial Orders-in-Council printed with 1902 Canada statutes, page xv., and 35 *Canada Gazette*, page 407.)

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., BOSSÉ, BLANCHET,
HALL, AND OUMET, JJ.

THE KING v. KNEELAND.

*Assembly in public street—Persons of general good character—Crim. Code
sec. 207.*

1. The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction.
2. Criminal Code sec. 207 does not apply to persons of general good character, but is intended to apply to loose, idle and disorderly persons only.

DECIDED : February 25, 1902.

The following case was reserved by his honour Mr. Recorder Weir, one of the Recorders of the Recorder's Court of the city of Montreal, under Article 743 of the Criminal Code, for the opinion of the Court of King's Bench:—

"On the 31st July, 1901, the prisoner was tried before me upon the sworn complaint of Pierre Batalon, constable, for having, on the 27th July, 1901, in the city of Montreal, unlawfully caused a disturbance in Union Avenue by incommoding peaceable passengers.

"I found that on the date mentioned, about 8 o'clock in the evening, the prisoner, who is a master printer by occupation, and a householder in the city, a man of general good character and reputation, was engaged with one or two companions in holding a kind of religious service, consisting of the singing of hymns, prayer and exhortation, on Union Avenue, near the corner of St. Catherine Street. Union Avenue is about 40 feet in width, and the eastern sidewalk is, in addition, about 17 feet wide. The complainant, who is a constable of the city's police

force, approached the prisoner whilst the prisoner was exhorting an assemblage of about 100 persons upon the subject of religion, and requested him to desist and to move away.

"The prisoner refused, and was therefore taken into custody. I found that the assemblage stood partly on the eastern sidewalk and partly on the street, leaving room for ordinary traffic, but obstructing the absolutely free passage of the highway, although I had no particular evidence of any persons having been incommoded. None of the prisoner's audience were arrested.

"After consideration I pronounced the prisoner guilty and imposed a fine of twenty-five cents, or one hour's imprisonment, but announced that I would submit a reserved case under Article 743 for the consideration of the Provincial Court of Appeal, as to whether, under the circumstances, the prisoner was rightly convicted.

"I believe that my judgment accorded with previous decisions of the Recorder's Court, but, as indicated by the reserving of the cause and the slight sentence imposed, I entertained some doubts to which I gave expression in rendering judgment, and which I may summarize here:

"1. The complaint is based upon sec. (f), art. 207 of the Criminal Code, which reads as follows:—

" ' Every one is a loose, idle or disorderly person or vagrant who (f) causes a disturbance in or near any street, road or highway, or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers. '

"I observed that the complaint does not particularize how the disturbance was caused, save by the words '*en gênant passants paisibles*.' The question seems pertinent as to whether the mode of impeding ought not to be, to fall within the statute, *ejusdem generis* with such acts as screaming, swearing, singing, or by being drunk. If so, the prisoner has it in his favour that his conduct was far removed from the riotous categories provided against by the article cited.

"2. Article 207 substantially consolidates and reproduces the Vagrancy Act (5 Geo. IV., ch. 83), which divided vagrants into three classes—(a) Idle and disorderly persons; (b) rogues and vagabonds; and (c) incorrigible persons. This article is highly penal, and justices have been warned to be very cautious as to how they exercise their powers under it. (Magistrates' Annual Practice, 1900, page 602).

"One authority remarks: 'The magistrate must be satisfied that the defendant is, in the full sense of the term, what the law for the purpose of defining its scope and intent has called him, "a rogue and a vagabond,"' (Cox's Principles of Punishment, page 213). The Act was designed for the suppression of vagrancy in the strict sense of that term, *i.e.*, wandering about the country, with no known place of abode, and to suppress the offences commonly committed by persons of this class, known as vagrants, who have no regular employment, but live by the exercise of their wits (*Ibid.*, page 211). Upon this view I have some doubt as to the applicability of art. 207 to an offence of this kind.

"The complaint might possibly, with greater show of reason, have been based upon section (e) of art. 207, which forbids loitering on any street, road, highway or public place and obstructing passengers by standing across the footpath, but I was impressed with the view that a literal and rigid application of this section would condemn much that is incidental to city life. A knot of brokers, discussing a change of markets on the curbstone, farmers on a market day, the crowds that assemble before newspaper offices from time to time, or on the street to participate in or to witness some procession, assemblies of citizens for municipal or political purposes, would hardly seem to be the classes of persons included in the purview of art. 207. And the defendant can scarcely be classed as a vagrant in the ordinary sense. I had evidence of his good character and position, and his language on the evening in question was quite in keeping with his professed aim in holding a public religious meeting.

"It has been held in Ontario that a person cannot be convicted of an offence under art. 207 unless he has acquired in some degree a character that brings him within its terms (*R. v. Assett*, 10 Ont. P.R. 386). And so the clause (*d*), as to begging, cannot be extended to persons collecting alms for a specific purpose and not as a way of life (*Pointon v. Hill*, L.R. 12 Q.B.D. 16). See also *Smith v. R.*, M.L.R. 4 Q.B. 325.

"This negative view also seems to have support from the amendment to sec (a) of art. 207, effected by 63-64 Vict., c. 46.

"3. I may add that Mr. Dicey, who in his 'Law of the Constitution,' page 44, discusses the right of public meeting in public places, is of opinion that such meetings can only be dealt with as interference with public convenience and therefore as nuisances.

In England such a case as the present would probably be dealt with under "The Highway Act" (1835), which makes it an offence to wilfully obstruct the free passage of any thoroughfare, and, if one may judge by the tenor of such cases as *Reg. v. Graham*, 15 Cox 310; *Homer v. Caman*, 55 L.J.M.C. 110; would probably have resulted in a conviction. But I have not met with any case where street preachers or holders of meetings in public places have been proceeded against under the provisions relating to vagrancy. I may also remark that the whole question of the control of public highways and the preservation of order hereon, does not seem to be adequately provided for by the laws of the city or province as yet.

"I now submit the following questions which arise upon a consideration of the foregoing:—

"1. Does the holding of a public meeting in a public street necessarily involve an impeding of peaceable passengers, and as a consequence the causing of a disturbance? Is direct evidence that peaceable passengers were impeded or incommoded essential to justify a conviction?

"2. Is Article 207 of the Criminal Code applicable to persons of general good character as opposed to loose, idle or dis-

orderly persons, who hold a public meeting in a public meeting place?"

MONTREAL, February 25, 1902.

(Translated.)

BOSSE, J.—This is a question reserved by His Honor the Recorder of Montreal, after conviction. It is submitted to us under Article 743 of the Criminal Code and the case transmitted finds the facts as follows:—(the learned Judge here set out the findings of fact and the questions reserved)

There is a difference between the English and French texts of Article 207. The expression "faire du tapage" does not appear to me to express the full sense of the English phrase "to cause a disturbance," particularly in the juridical sense of the words. But as regards the principal points of the judgment which we are called upon to give, the difference is unimportant. Apart from any statutory definition of what constitutes a vagrant, it may be said generally that at common law a vagrant is any person going about begging or soliciting alms and declining to work. Following this definition there would probably be no offence in the present case, but Article 207 of the Criminal Code declares that one is a loose, idle or disorderly person or vagrant (*vagabond, libertin, desoeuvré or débauché*) who

(e) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footway, or by using insulting language, or in any other way;

(f) Causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers.

Under these two sub-sections (and they are the only ones having any bearing on this case) it is necessary (e) that the accused should have loitered in the streets and obstructed passers-by by blocking the footway, or (f) that he should have

caused a disturbance (*fait du tapage*) in the streets by crying out, swearing or singing, or by being drunk, or by impeding or incommoding (*gênant ou incommodant*) peaceable passers-by.

Under either clause it is therefore essential, to constitute the offence, that passengers were obstructed or inconvenienced. The case is restricted to these two statutory provisions.

Now, the Recorder informs us that there was no proof that any person was either obstructed or inconvenienced, or that there was any tumult or disturbance. He adds that the accused is a citizen of Montreal, a householder here, and that he follows a regular and honest occupation. These facts exclude all thought of vagrancy either at common law or under the two sub-sections of Article 207.

Consequently the question resolves itself into this—whether the simple fact of having caused an assemblage of a more or less large number of persons for an object allowable in itself, and under the circumstances stated, is punishable under one or or the other of these two sub-sections. We believe not.

And if it were obligatory to so apply these two paragraphs (*e*) and (*f*), the casual interviews of people meeting on the foot-path, the conversation which such persons might have upon any matter or in the discussion of the question of the day, the meeting of two or more persons with reference to some matter of mutual concern, would be forbidden, and any of us would be daily exposed to a charge of vagrancy. The construction we give it is the same as has been given in this province by various Courts, as well under the existing law as under similar laws. *Smith v. Regina*, M.L.R. 4 Q.B. 325; *Hicks v. State*, 76 Georgia 000; *Pointon v. Hill*, L.R. 12 Q.B.D. 306; *Re Jordan*, 50 N.W.R. 1087 (Mich.). One finds everywhere and in different forms, that the construction of statutes known under the name of Acts concerning vagrancy calls for the exclusion of persons following a lawful occupation or having legitimate means of maintaining themselves, and enjoying a generally good reputation as well.

If any offence is here shewn—and upon that point we

express no opinion—it would be that of public nuisance, punishable under Article 191, which in effect reproduces the English common law. To gather together a group or assembly by gestures, or by a speech, or the exhibition of objects of art or curiosity, or by any other method, and, in so doing, to interrupt or incommode the traffic in the streets or public places always was and still is punishable, but as a public nuisance and under that heading alone, without its ever having been considered to be a similar offence to vagrancy.

We are, therefore, of opinion that the answers to be given to the questions submitted are:—

1. The fact of holding a meeting in a street does not necessarily imply, in the legal sense of the word, the impeding, obstructing or incommoding (*gêne ou incommodité*) of passengers, and proof that some one was impeded or incommoded is necessary in order to justify a conviction.

2. Article 207 of the Criminal Code is applicable only to loose, idle and disorderly persons and does not apply to persons of good character. The conviction will therefore be quashed.

Conviction quashed.

J. P. Cooke, K.C., for the Crown.

Saint-Pierre, K.C., and C. A. Wilson, for the accused.

[SUPREME COURT OF NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, McGUIRE, SCOTT, AND WETMORE, JJ.

CAVANAGH v. McILMOYLE.

Liquor License Ordinance—Appeal from conviction—Affidavit negating guilt—Statutory requisites—Jurisdiction—Waiver—N.W.T. Ord. 1900, ch. 32, sec. 22—Crim. Code secs. 880, 893.

1. A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the justice who tried the cause that he did not, by himself or otherwise, commit the offence, is not *ultra vires* of the Legislative Assembly.
2. Such enactment is not inconsistent with section 880 of the Criminal Code, made applicable to the Territories by the North-West Territories Act.
3. The omission to make such affidavit within the time prescribed deprives the Court to which the appeal is given of jurisdiction, and such omission cannot be waived so as to confer jurisdiction.

ARGUED: December 3, 1901.

DECIDED: December 4, 1901.

This was a case submitted by Wetmore, J., for the opinion of the Court en banc. The appellant was convicted before a justice of the peace for allowing playing at cards with betting in his licensed hotel premises contrary to the provisions of The Liquor License Ordinance. He appealed against such conviction to a Judge of this Court sitting without a jury, and such appeal came on to be heard before Wetmore, J. The affidavit required by section 22 of Ordinance ch. 32 of 1900, was made by the appellant and filed with the clerk of the Court, but such affidavit was not made within the time limited for giving notice of such appeal, as prescribed by that section. Counsel appeared for the respondent and for the Attorney-General of the North-West Territories, and stated that he was willing to waive the omission to make the affidavit in proper time if that would confer jurisdiction to hear the appeal; but he urged that such waiver would not confer jurisdiction, or, in other words, that such omission could not be waived. The

other preliminaries to the appeal were admitted to be correct. Counsel for the appellant contended that the omission could be waived so as to confer jurisdiction. He also contended that section 22 of the Ordinance in question was *ultra vires* of the Legislative Assembly, because Parliament is the only authority, *quoad* the North-West Territories, which can legislate upon the subject of procedure for the recovery of fines and penalties provided for a breach of a Territorial Ordinance, and therefore that the section 22 in question, being a departure from section 880 of The Criminal Code, was *ultra vires*.

The questions submitted for the consideration of the Court *en banc* were:—

- 1st. Is section 22 of Ordinance 32 of 1900, so *ultra vires*?
- 2nd. Can the omission to make the affidavit within the time prescribed by that section, be waived so as to give the Judge jurisdiction to hear the appeal?

The case was heard December 3rd, 1901.

No one for appellant.

H. Harvey, Deputy Attorney-General, for respondent. The omission to make the affidavit within the prescribed time is not one which can be waived so as to confer jurisdiction: *Alderson v. Palliser*, [1901] 2 K.B. 833; 70 L.J.K.B. 935; 49 W.R. 706; 17 Times L.R. 742; 85 L.T. 210; *In re Jones v. James* (1850), 19 L.J.Q.B. 257; 1 L. M. & P. 65; *Moore v. Gamgee* (1890), 25 Q.B.D. 244; 59 L.J.Q.B. 505; 38 W.R. 669; *Lord v. The Queen* (1901), 31 Can. S.C.R. 165. The section in question is not *ultra vires* of the Legislative Assembly: *Regina v. Wason* (1890), 17 Ont. App. R. 221; *Regina v. Bittle* (1892), 21 O.R. 605.

REGINA, N.W.T.: December 4, 1901.

The judgment of the Court was delivered by

WETMORE, J.:—The first question to be decided under the reference in this case is whether or not section 22 of Ordinance

b. 32 of 1900 is *ultra vires* of the Legislative Assembly. By virtue of section 13 of The North-West Territories Act, as enacted by section 6 of 54-55 Vict. 1891, ch. 22, and as amended by section 6 of 60-61 Vict. 1897, ch. 28, the Assembly has power "subject to the provisions . . . of any . . . Act of the Parliament of Canada declared to be applicable to the Territories," to make ordinances for the government of the Territories in relation to, among other things, "the imposition of punishment by fine, penalty or imprisonment for enforcing any Territorial Ordinances." This power will be found in paragraph 11 of the section 13 referred to, and the language of the paragraph is in effect the same as that of paragraph 15 of section 92 of the British North America Act, 1867, conferring powers of legislation with respect to practically the same subject matter on the Provincial Legislatures. It was held in *Regina v. Wason*, 17 Ont. App. R. 221, that the power given by paragraph 15 of section 92 of the British North America Act to legislate respecting the imposition of punishment by fine, etc., for enforcing any law of the Province, carried with it the power to provide the machinery by or under which the punishment may be enforced: in other words, it empowered the Provincial Legislatures to provide a procedure to enforce such punishment. We entirely agree with the decision in that case so far as that question is concerned, and with the reasons therein given therefor. The only question remaining for decision is, so far as this branch of the reference is concerned, whether section 22 of the Ordinance in question is inconsistent with the provisions of Part LVIII. of The Criminal Code, 1892, relating to "Summary Convictions," inasmuch as the provisions of the Criminal Code are by virtue of section 983 thereof made applicable to The North-West Territories, *except in so far as they are inconsistent with the provisions of the North-West Territories Act and the amendments thereto*. It is a question, to say the least, fairly open to discussion whether the Legislative Assembly has not as incidental to the powers conferred on it by paragraph 11 of

section 13, as enacted by the Act of 1891, already referred to, power to enact a Summary Convictions Ordinance to enforce the imposition of punishment provided for a breach of Territorial Ordinances. It is not, however, necessary for the purposes of this reference to decide that question, because we are of opinion that the provisions of section 22 of such Ordinance are not inconsistent with the provisions of the Code relating to "summary convictions." The question turns upon the reading of section 880 of the Code. That section provides that "every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following"; then the section goes on to provide what are usually called the preliminary proceedings for the bringing and entering of the appeal. Section 22 of the Ordinance merely provides another preliminary requisite which is in no way whatever inconsistent with those provided in section 880 of the Code. As a matter of fact, it does not interfere in the slightest degree with the preliminaries provided for in section 880. We are of opinion, to say the least, that such legislation was quite open to the Legislative Assembly by virtue of paragraph 11 of section 15 as enacted by the Act of 1891, in view of the light turned upon it by the conclusion mentioned as reached in *Regina v. Wason*, 17 Ont. App. R. 221.

We, therefore, advise that section 22 of Ordinance ch. 32 is not *ultra vires* of the Legislative Assembly.

We are also of opinion, and so advise, that the omission to make the affidavit within the time prescribed by that section of that Ordinance, is fatal to the jurisdiction of the Judge to entertain the appeal, and that such omission cannot be waived. We draw attention to a very late case upon the question of waiver of statutory conditions precedent to the exercise of jurisdiction, *Alderson v. Palliser*, [1901] 2 K.B. 833; 70 L.J.K.B. 935; 49 W.R. 706; 17 Times L.R. 742¹; 85 L.T. 210. We are, however, influenced in reaching the conclusion we have upon this branch of the Ordinance by two reasons.

1st. The language of the section of the Ordinance in ques-

tion is not merely imperative, it is prohibitive; it provides that "no appeal shall be . . . unless" the steps pointed out by the section are taken.

2nd. The provision as to time is not imposed principally for the benefit of the party as put by Strong, C.J., in *Lord v. The Queen*, 31 Can. S.C.R. 165. It was enacted in the public interest and for the better protection and enforcement of the law respecting the keeping of orderly licensed houses. It is quite well known that this provision was enacted in view of a recent decision of this Court which it was thought rendered it possible for a person convicted of an offence under The Liquor License Ordinance, by a frivolous appeal to practically suspend the operation of that law as to certain ulterior consequences of convictions in certain cases, as, for instance, suspension or forfeiture of his license, and, therefore, it was provided that there should be no right of appeal unless the proposed appellant made the affidavit prescribed by the section, and made it within the prescribed time. In both the respects pointed out the question now under consideration differs from that in *Lord v. The Queen*.

Judgment for the Respondent.

Note: *Effect of acquiescence in jurisdiction.*

The following is the text of section 22 of the Ordinance of 1900, chapter 32 referred to in the above judgment:

"No appeal shall lie from a conviction for any violation or contravention of any of the provisions of this Ordinance unless the party appealing shall within the time limited for giving notice of such appeal make an affidavit before the justice or one of the justices or police magistrates who tried the cause that he did not by himself or by his agent, servant or employee or any other person with his knowledge or consent, commit the offence charged in the information; and such affidavit shall negative the charge in the terms used in the information, and shall further negative the commission of the offence by the agent, servant or employee of the accused or any other person with his knowledge or consent; which affidavit shall be transmitted with the conviction to the court to which the appeal is given."

A similar restriction is made by section 23 upon the right to grant a writ of certiorari.

Note—Continued.*Effect of acquiescence in jurisdiction.*

Where total absence of jurisdiction appears on the face of the proceedings in an inferior court, the superior court is bound to issue a prohibition although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court. *Farquharson v. Morgan*, [1894] 1 Q.B. 552 (C.A.); *Alderson v. Palliser*, [1901] 2 K.B. 833 (C.A.).

In the former case Lord Justice Davey said:

“ There are two principles which are engrained in our law. One is that parties cannot by contract oust the jurisdiction of the Queen’s Courts. This has been somewhat modified by the power given to the court by sec. 11 of the Common Law Procedure Act 1854, now sec. 4 of the Arbitration Act 1889 (Imp.) to give effect to an agreement to refer disputes to arbitration, subject to certain well-known conditions; but subject to this power it is no defence to an action, otherwise competent that the parties have agreed to refer the question in dispute to arbitration or to provide for its settlement in some other mode. The other principle is correlative to the first: it is that the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess. To do so would be an usurpation of the prerogative of the Crown, and it has always been the policy of our law as a question of public order to keep inferior courts strictly within their proper sphere of jurisdiction; see the judgment of the Common Pleas in *Worthington v. Jefferies*, L.R. 10 C.P. 379.”

In *Alderson v. Palliser*, [1901] 2 K.B. 833, 839, Stirling, L.J., says:

“ Waiver is merely a form of agreement or consent to a particular course of action; and if the county court judge had no jurisdiction in the present case, the parties could not confer it upon him by consent.”

There is a distinction between mere irregularities of procedure and preliminary matters essential to jurisdiction. And where the defect is not apparent on the face of the proceedings there may be such a waiver or acquiescence to disentitle the applicant to a writ of prohibition. In *Marsden v. Wardle*, 3 E. & B. 695, 701, Coleridge, J., said:

“ There is no reason for refusing the writ after judgment in the courts where the proceedings set forth the details of the matter and the party has the opportunity of moving before judgment. Then, if he choose to wait and take the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below, because the complaint in that case does not rest on the evidence of the complainant, and if such a defective record were allowed to remain and to support a judgment it might become a precedent; that which was in truth an excess of jurisdiction might be considered to have been held to be legal.”

—Continued.

of acquiescence in jurisdiction.

The latter distinction is one of substance and does not depend on the existence of a formal record, but on the distinction between a defect which is apparent and a defect which depends on evidence. *Farguharson v. Mor-* [1894] 1 Q.B. at page 563.

See also the next case, *The Queen v. McLeod*, and *Simington v. Colbourne*. Cr. Cas. 367.

SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, J.

THE QUEEN v. McLEOD.

For license law—Illegal sales by licensee, his servant, agent or employee—Statutory presumption—Validity—Servant's acts attributable to master—Fine and imprisonment—Constitutional law—Interference with liberty of the subject—Forfeiture of license for second offence—Prior offence during a previous license term—Appeal from summary conviction—Expediting the hearing—N.W.T. Ordinances 1900, ch. 32, sec. 23, and 1901, ch. 33, sec. 21—Crim. Code secs. 879, 880.

Where a liquor license law provides that "the person violating" the section thereof relating to sales by licensees during prohibited hours shall for a second or subsequent offence forfeit his license, the forfeiture will result although the offence stated in the prior conviction was not under the license the same license term but under a previous license, which had since expired.

Section 64, sub-section 5 of the Liquor License Ordinance (N.W.T.) is not *per se* as constituting an undue interference with the liberty of the subject, although its effect may be to punish a license holder by imprisonment for illegal acts which have been committed by his servant, agent or employee, and which by virtue of the Ordinance are presumed to be the acts of the licensee.

An appeal from a summary conviction under the Liquor License Ordinance (N.W.T.) may, under Ordinance of 1901, ch. 33, sec. 21, before the first day of the sittings be expedited by the judge appointed to take the sittings for which notice of appeal was given.

JED: December 31, 1901.

DED: January 10, 1902.

The appellant was, on 5th December, 1901, convicted before the justice of the peace of having, on 17th November, in the

Windsor Hotel at Regina, being a place where liquor may be sold, unlawfully sold liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes being produced by the vendee; and it appearing to the justice of the peace that the appellant was previously, on 24th October, 1900, convicted before a justice of the peace of having, on 14th October, 1900, unlawfully sold liquor in said premises contrary to the provisions of the Liquor License Ordinance, and it also appearing that on 25th April, 1901, said appellant was again duly convicted before a justice of the peace of having in said premises unlawfully sold liquor contrary to the provisions of the Liquor License Ordinance, said first named justice of the peace did adjudge the offence of said appellant so firstly mentioned to be her third offence against said Ordinance, and adjudged her to pay a fine of \$175, with absolute forfeiture of license, and if the fine was not paid forthwith to five months imprisonment.

On 7th December, 1901, appellant gave notice of intention to prosecute an appeal "before the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the town of Regina on Tuesday, the 25th day of March, 1902," and duly made and deposited the affidavit required by Ordinance 1900, ch. 32, sec. 22, and Ordinance 1901, ch. 33, sec. 21.

On December 31st an application was made to RICHARDSON, J., on behalf of the Attorney-General under Ordinance 1901, ch. 33, sec. 21, on notice to the appellant to expedite the hearing, and after argument by counsel, the learned Judge fixed January 4th, 1902.

T. C. Johnstone, for the appellant, objected that as the notice of appeal to "the presiding Judge, etc.," complied with secs. 879 and 880 of the Criminal Code, the motion could be made only to the same Court, which did not come into existence until the day named, and therefore the learned Judge had, until then, no jurisdiction.

Horace Harvey, Deputy-Attorney-General, for respondent, and the Attorney-General, contended that the appeal lay to the Supreme Court for the Judicial District named, generally, and the sittings mentioned in the notice of appeal merely did not constitute a Court within the meaning of those sections. To hold otherwise would be to virtually remove sub-sec. 3 of sec. 21, ch. 33 of 1901, from the Ordinances.

At the hearing, the appellant produced the notice of appeal, recognizance, and her affidavit, which asserted

"That I did not, nor did my agent, servant or employee, or any other person with my knowledge or consent, on the seventeenth day of November, 1901, or at any other time on the premises known as the Windsor Hotel, being a place where liquor may be sold, sell liquor during the time prohibited by the Liquor License Ordinance for the sale of the same, without any requisition for medicinal purposes as required by the said Ordinance being produced."

It was admitted on behalf of appellant that the wrongful sale was made, as alleged in the conviction, by the servant or employee of the appellant, and the prior convictions were not disputed. For the respondent, the truth of the matters set out in appellant's affidavit was admitted.

For the appellant it was urged that the conviction was bad, because, upon failure to pay the fine imposed, appellant was liable to imprisonment, although upon the facts as admitted, she had committed no offence; that this was an unwarrantable interference with the liberty of the subject and *ultra vires* of the Legislative Assembly. He also contended that prior convictions, in order to support forfeiture of license, must be had under the same license as the subsequent offence, otherwise there would be no limitation. It could not be the intention that offences committed an indefinite number of years ago should be brought up against a licensee.

For the respondent it was submitted that there was no undue interference with the liberty of the subject. By force of the Ordinance, the offence of the servant became the offence

of the employer, and a licensee knew, when obtaining his license, the conditions under which it was granted. As to prior convictions he referred to *Reg. v. Black*, 43 U.C.Q.B. 180.

REGINA, N.W.T.. January 10th, 1902.

RICHARDSON, J.:—On the application to expediate the hearing, Mr. Johnstone, for appellant, urged that inasmuch as the notice of appeal complied with the requirements of secs. 879 and 880 of the Criminal Code, I attained no jurisdiction to hear and determine the matter at any earlier date than that named in the notice, which would be at a regular constituted sittings of the Court, and that the power given by sub-sec.3, sec. 21, ch. 33 of 1901, could only be exercised at the time named in the notice.

After hearing Mr. Harvey, Deputy Attorney-General, in reply to this jurisdiction, I overruled it. By referring to sub-sec. 3, sec. 21, ch. 33 of 1901, it will be observed that the power given the Judge on the application of the Attorney-General to expediate the hearing of appeals is dealing with procedure, which was held in *Cavanagh v. McIlmoyle*, [6 Can. Cr. Cas. 88.] decided en banc in December term, 1901, to be within the powers of the Legislative Assembly, such power not being inconsistent, in my opinion, with section 879, of the Criminal Code conferring the right of appeal from summary convictions.

The hearing of the appeal was then proceeded with. For the appellant, it was contended that as, by the conviction, imprisonment on non-payment of the fine was imposed upon appellant, she not having personally violated the law, as was admitted by respondent, the conviction was bad.

But as by sec. 64, sub-sec. 5, of the Ordinance, "any contravention of the provisions of this section by a servant, agent, or employee of a licensee" (the appellant being a licensee, and the offence in question being one created by that section) "shall be presumed to be the act of such licensee," and this presumption not having been by any proof rebutted, the objection, in

my judgment, is not sustainable, the offence being by the Ordinance her own.

For the respondent it was then established that the appellant was previously convicted of offences under sec. 64 on two separate occasions, namely, 14th October, 1900, and 25th April, 1901, consequent upon proof of which before the convicting justice, that functionary declared appellant's license absolutely forfeited. This is provided for by sec. 82, which enacts that "violation of any of the provisions of sec. 64 hereof shall be an offence for which the person violating shall be liable on summary conviction" . . . "for the second or any subsequent offence to a penalty of" from \$100 to \$200, with absolute forfeiture of license, and in default of payment forthwith to from four to six months imprisonment.

It was contended on behalf of the appellant that as the license under which she became licensee did not exist when such prior convictions were made, it could not be affected thereby, as, by the proper construction of sec. 82, the offences there referred to mean offences committed during the currency of living licenses.

Now, it is to be noticed that in this sec. 82 the words used are "the person violating," not the "licensee violating," or "the person holding the license violating," which if used, might perhaps reasonably be taken to limit the section, as contended for on behalf of the appellant. I conceive that the proper construction of section 82 is that applied by the Court of Queen's Bench of Ontario in *Reg. v. Black*, to like words in an Ontario Act regulating liquor licenses, viz., that offences under section 82 are not simply offences against the license issued for a particular year, but offences against section 64 and the social order which that section of the Ordinance is intended to enforce . . . "and unequivocally indicates the intention by the Legislature to punish the offences under section 82 as offences against public order" . . . "whether the several offences were committed on several days in the same year, or on different days in different years. The offences are still against

social order and still against law." See also *Ex parte Sheritt*, L.R. 5 Q.B. 174; *Reg. v. Vine*, 44 L.J.M.C. 60; L.R. 10 Q.B. 195; 31 L.T. 842; 23 W.R. 649; 13 Cox C.C. 43. In my judgment the present appeal must be dismissed, and the conviction affirmed with costs.

Conviction affirmed.

Note: Liquor License Ordinance (No. 1)—Forfeiture of license on second offence.

The Liquor License Ordinance, N.W.T., Consol. Ordinances of 1898, ch. 89, provides in sec. 64, sub-sec. 5 thereof, that—

"Any contravention of the provisions of this section by a servant, agent or employee of a licensee shall be presumed to be the act of such licensee."

This provision is consolidated from Ordinance No. 7 of 1897, sec. 59, and is held, *supra*, to be *intra vires* of the Legislature of the North-West Territories.

Sec. 82 of the same Ordinance enacts that—

"Violation of any of the provisions of section 64 hereof shall be an offence for which the person violating shall be liable on summary conviction:—

For the first offence to a penalty of not less than \$50 or more than \$100, and in default of payment forthwith after conviction, to not less than two months' or more than four months' imprisonment. For the second or any subsequent offence to a penalty of not less than \$100 or more than \$200, with absolute forfeiture of license, and in default of payment forthwith after conviction to not less than four nor more than six months' imprisonment, with absolute forfeiture of license."

In *Regina v. Black* (1878), 43 U.C.Q.B. 180, the late Chief Justice Harrison, delivering the judgment of the Ontario Court of Queen's Bench, said:—

"It appears to us that offences under sec. 43 of the Act (The Ontario Liquor License Act, R.S.O. 1877, ch. 181) are not simply offences against the license issued for a particular year, but offences against the Act and the social order which that section of the Act is intended to enforce. The punishment for such offences is not merely under particular circumstances the revocation of the license, but in all cases fine or imprisonment, or imprisonment alone. This unequivocally indicates on the part of the Legislature an intention to punish the offences under sec. 43 as offences against public order. This being so, whether the several offences are committed on several days in the same year, or on different days in different years, the offences are still against social order and still against law, and must still be classed as first, second, third and fourth, according to the time of their commission. See *Ex parte Short*, L.R. 5 Q.B. 174; *Regina v. Vine*, L.R. 10 Q.B. 195."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE AND MEAGHER, JJ.

THE QUEEN v. BOWERS.

Theft — Habeas Corpus — Jurisdiction of County Court Judge in Nova Scotia—Acts of 1897, ch. 32, sec. 2—Costs against informant.

1. A person made a respondent to an application for a *habeas corpus* in a criminal matter who does not appear of record to be the prosecutor, and who does not appear on the application, is not liable in Nova Scotia for costs on the discharge of the prisoner in the *habeas corpus* proceedings, although the conviction in question was for stealing his property.
2. *Quære*, whether a County Court judge in Nova Scotia has power as a master of the Supreme Court to entertain *habeas corpus* applications.

ARGUED: November 23, 1900.

DECIDED: November 23, 1900.

Defendant was convicted by the stipendiary magistrate of the City of Halifax, for having stolen one pair of pants, of the value of two dollars, the property of Harry Brown, and was adjudged for said offence to be imprisoned in the city prison, in Halifax, and there kept at hard labor for the space of six months.

The conviction contained a recital that defendant, being charged before said magistrate with said offence, consented to be tried summarily.

Application was made to the Judge of the County Court in his capacity as a Master of the Court, for defendant's discharge from custody, under *habeas corpus* proceedings, on the grounds that no consent to be tried summarily was given, that the charge was not reduced to writing, and that defendant was not asked whether or not he was guilty of said charge.

The learned Judge directed defendant's discharge, without the actual issue of a writ of *habeas corpus*, and further ordered that "the informant, Harry Brown," pay defendant the costs of his application, and of the order for his discharge.

There was nothing to shew that Brown was the informant

except a statement to that effect in the affidavit of defendant,
upon which the application for the order was made, which was
not borne out by either the conviction or the commitment.

This was an appeal from so much of the order as related to the payment of costs by the informant.

HALIFAX, November 23, 1900.

J. J. Power moved for security for costs. (RITCHIE, J.—You bring the informant into this Court, and then ask for security for costs. I have yet to learn that this can be done under our practice). Brown was the prosecutor below. (RITCHIE, J.—So far as the record discloses, he is neither the informant nor the prosecutor. Can you point to any case in which an informant has been made to pay costs?) The Court has inherent jurisdiction to order security for costs: *Dence v. Mason*, W.N., 1879. (MEAGHER, J.—Can you point to a case where security was ordered in a criminal case against a party who was not on the record?): *The Queen v. Ida Adams*, 24 N.S.R. 559; 5 App. Cas. 506. (WEATHERBE, J., referred to *Fielding v. Thomas*; *Attorney-General of Canada v. Attorney-General of Ontario*, [1898] A.C. 254.)

C. P. Fullerton in support of appeal. Assuming the Master had all the powers of this Court, the order appealed from was improper. (Mr. Fullerton was stopped by the Court both as to the appeal and the motion for security).

J. J. Power, contra: *The Queen v. Cox*, 31 N.S.R. 313. (MEAGHER, J.—A Judge at Chambers is not authorized, under the Judicature Act, to hear *habeas corpus* proceedings, and he has no such authority at Common Law): Judicature Act, sec. 8, sub-sec. 2; *The Queen v. Doherty*, 32 N.S.R. 240. Where a judgment is obtained by perjury, it will not be set aside upon mere proof of that fact: *Baker v. Wadsworth*, 67 L.J.Q.B. 301; *Flower v. Lloyd*, 10 Ch.D. 333.

HALIFAX, November 23, 1900.

MCDONALD, C.J.:—I am of opinion that Mr. Fullerton's motion should prevail, for the reason that there is no evidence that Brown was the prosecutor or informant.

RITCHIE, J., concurred.

WEATHERBE, J.:—Mr. Fullerton's motion must prevail. The Master had no power to make this order respecting costs.

MEAGHER, J.:—The Master, when he made the order now sought to be discharged, was acting merely as a delegate of this Court; I say this, of course, on the assumption that he had jurisdiction to entertain the application first made to him. In another aspect, if, without jurisdiction, he assumed to use the process of the Court, the case comes within the principle of *In re Sproule*, 12 Can. S.C.R. 140. On the first application before him, the Master had the affidavit of the informant, stating that Brown was the informant. But the conviction, a copy of which was in proof, did not shew, nor was it otherwise disclosed, that Brown was an informant, or in any wise a party to the proceedings. On the contrary, I should have supposed that the conviction excluded the theory that Brown was the informant.

The Master, on the motion to rescind, came to the conclusion that Brown was not the informant, and that the statement in the accused's affidavit that he was, was therefore untrue. The first order imposing costs on Brown was clearly wrong, and ought not to have been made.

The Master, however, when he rescinded the first order he made, directed that Brown should pay the costs of that motion; he did so upon the theory that Brown, not having appeared to answer the application in the first instance, had acquiesced in the theory that he was the informant. I am unable to agree with that conclusion from such premises. Indeed, I think such a conclusion reversed the natural order of things. Brown was

justified in assuming that, not being an informant, or party, no order for costs would be made against him. The order was obtained upon an untrue statement, one so obviously untrue that an examination of the papers would, I think, have disclosed its untruth. Brown was not under any obligation to appear in answer to the summons for a *habeas corpus*. The property which the defendant was charged to have stolen belonged to Brown, and he had a right to assume that the summons was served on him, not because he was a party to the proceedings, but because it was his property that was stolen. In that view, which was one quite open to him, his remaining away from the hearing should not, and could not, properly be regarded as conduct, or acquiescence, which justified or authorized the Master to impose costs. A wrong had been done to Brown by the first order, and he was entitled to have it redressed without condition, and without punishment, so far as he was concerned.

It is therefore obvious that the Master proceeded entirely upon a wrong view of the facts, and of Brown's position and conduct, and applied an erroneous principle in determining the motion before him.

The keeper of Rockhead prison was also summoned, and so was the magistrate, but they did not appear, and if non-appearance was a ground for presuming acquiescence, the Master had as much right to award costs against either of these parties as against Brown—having regard to the true state of facts which the Master then found to exist—viz., that Brown was not in any sense a party.

I have substantial doubts as to the jurisdiction of the Master to hear the application for a *habeas corpus*. It does not call for determination, and nothing more need be said on that branch.

The motion to discharge the order must prevail.

Appeal allowed.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

THE KING v. LAURIN (No. 4).

Homicide—Dying declaration—Requisites—Declarant's belief in impending death—Want of hope of recovery—Cr. Code sec. 237.

1. To admit a dying declaration as evidence in a homicide case, the declarant must be under the solemn conviction that his death will within a proximately short time follow as the result of the wound, and he must have no hope whatever of recovery therefrom.

DECIDED: March 18, 1902.

The prisoner was on his trial on the charge of having murdered George Wellington Smith, a coloured man who was one of his father's grooms, on the 26th day of January, 1902.

It was alleged that deceased, in the evening of the day on which he had been shot, had made a dying declaration, while lying in the hospital of the Hotel Dieu, to Acting-Detective Thomas Gallagher, and the latter was under examination as a witness for the Crown for the purpose of proving the alleged dying declaration.

MONTREAL, March 18, 1902.

St-Pierre, K.C., counsel for the prisoner, contended that under the circumstances stated by the witness any statement which the deceased might have made was inadmissible as a dying declaration.

Cooke, K.C., for the Crown, submitted that the conditions required in order to admit a dying declaration existed.

The sitting was adjourned for two hours to allow the Judge to read the evidence which had been given respecting the state

of the deceased, and at the expiration of that time he gave the following ruling:—

WURTELE, J.:—A dying declaration is a kind of evidence *which* is contrary to the general rule, to the general spirit of *our law*. Our law prohibits, in the first place, all hearsay evidence, and especially requires that evidence against an *accused* person should be given in the presence of such person, and *that* he should have full opportunity to cross-examine the witness; and, in the next place, the general rule is that the jury should see the witness and should hear him give his evidence, and thus be enabled from his demeanor to test him, and to form an opinion as to what credit they should give to his testimony.

These elements are all wanting in the case of a dying declaration, which is an exception to the general rule. The declaration is generally made out of the presence of the accused; it is, in fact, only exceptionally that it is made in his presence; the accused generally has had no opportunity of cross-examining the witness; the jury have had no opportunity to see the demeanour of the deceased when he made the declaration; and, then, it is hearsay evidence, because it is not evidence given before the jury by a witness who personally knows the facts whereof he speaks, but is merely a reproduction by the witness of what the deceased said. Although the giving in evidence of a dying declaration is against the general rule of the English law of evidence, still it is admitted to be necessary in cases of murder and manslaughter to allow proof of the crime to be made by the dying declaration of the deceased. The reason is because it may be impossible otherwise to ascertain the facts and know who was the criminal who inflicted the wound which caused the death of the person who made the dying declaration.

Then, again, another reason for allowing the admission of a dying declaration in evidence is that testimony is generally given under the solemnity of an oath, by which the deponent

calls the Almighty to witness that he will give true testimony in the case, that he will not forswear himself, and that all he says will be the truth, the whole truth and nothing but the truth, while in the case of a dying declaration, the declarant speaks under as solemn a condition; he feels and knows that his death is impending, and that he will soon have to answer to the Almighty for the words which he is about to utter.

A dying declaration may be given under oath, and sometimes it is; but, generally, it is not so given, and the reason why it is received when it is not made under oath is because it is made with the knowledge of the person who makes it, that within a short time, perhaps within a few minutes, he will be called to answer before his Maker for the sins which he may have committed, including the possible offence of having by a false declaration under the sanction of the law caused the death, or a long and grievous imprisonment, of a fellow creature. Under that sanction, therefore, a dying declaration must have been made with a full sense of impending death.

The person who makes the dying declaration must be thoroughly convinced that he is about to die; he must have no hope, nor glimmer of hope. It is not a matter merely of thinking, but it must be a matter of solemn conviction that he is going soon to die, and he must have no hope whatever of recovery. It is under these circumstances alone that the law allows dying declarations to be admitted in evidence.

To emphasize these principles, I repeat that dying declarations to be admissible as evidence must be made by a person who is fully convinced that he is going to die, that death is close at hand, and who is without any hope of recovery or of continuance of life. There must be an unqualified belief in the nearness and certainty of death, and no hope whatever of escaping it. If a person makes a declaration under all these conditions, the fact that death does not take place until some time after will not make the declaration inadmissible in evidence; the time at which the death may afterwards take place is immaterial, provided it occurs with certain proximity and

the result of the crime committed; it may take place immediately after the declaration is made, or within a few moments or in a few hours, or it may take place some days or even some weeks after. The things to be ascertained are in the first place the state of the mind of the declarant at the time the dying declaration was made, and in the next place the fact that death subsequently occurred and was the result of the crime charged against the accused, either murder or manslaughter.

A declaration which has been made under these circumstances is valid although the person who made it may afterwards entertain hopes of recovery; in order to be admissible, death must ensue, but it is not necessary that the person who made the declaration should be in a hopeless state from the time he made it until his death; he may get hopes later on, he may entertain hopes after the day on which he made the declaration. The question to be looked into and the point to be ascertained is whether at the time he made the declaration he had any hope or glimmer of hope of living.

The declaration that was made to the widow by the deceased was made under these conditions; at the time he made that declaration, he had no hope of recovery, although he lived for many hours afterwards. The physicians had told him that he was about to die; he told his wife that he was dying and to make arrangements about the insurance on his life, and he had received extreme unction which is only administered when death is impending. All the conditions to make the declaration valid existed at the time, and whether he entertained hopes of recovery later on or not is therefore immaterial. Now, the Crown, in proceeding to make its case, wishes to put in evidence a subsequent declaration made to Acting-Detective Gallagher; but I have to see whether all the necessary conditions in order to make that declaration admissible in evidence existed, whether he was then hopeless of recovery; whether he had any expectancy at that moment of recovering, or was without any hope; whether he had even a glimmer of hope that death was not impending. Impending death does not mean death about to

occur immediately or within a few moments; impending death is the expectancy and certainty that death will be the sure result of the wound from which the declarant is suffering within a certain proximate period of time, and that there is really no hope whatever of his recovery from the effects of the wound.

Now, the opinion of the physicians, as to the condition of the deceased, is to a certain extent immaterial; it is necessary that he should have been in danger of death, and therefore the opinion of the physicians in that respect is essential, but the essential point is with respect to what the man himself believed. Supposing the physicians were under the impression, from their medical knowledge, that the wounded man could not recover, still if the man, notwithstanding the opinion of the physicians, entertained hopes, however faint, of ultimate recovery, his declaration under these circumstances is inadmissible in evidence. In order to shew the extent to which that principle is maintained in England, I can refer to two cases.

In one case, that of *The King v. Errington*, 2 Lew. C.C. 148, the wounded man stated, when he made his declaration:—"I think myself in great danger." In the other case, that of *The King v. Murphy*, 1 Arm. M. & O. 206 (Ir.), the wounded man, while making his declaration, uttered these words:—"I have no hope of recovering unless it be the will of God."

It was held in these cases that the declarations were not sufficient to indicate that the men had a hopeless expectancy of death, that they expected to die, and knew perfectly well that they could not recover. In the lastly mentioned case the declarant said: "I have no hope of recovering"—and if he had stopped there, it would have been sufficient to make his declaration admissible but he went further and said: "Unless it be the will of God." This shewed that he still had some hope. In the other case, the declarant uttered the words: "I think myself in great danger," and it was held, that it was not sufficient to indicate the hopeless expectancy of death. What the law requires is not that the man should think, but

that the man should be thoroughly convinced; there must be an impression and a sincere and sure conviction on the mind of the person who makes the declaration, that his case is perfectly hopeless, that he cannot recover, and that he is about to meet his Maker within a short space of time. These are the principles of the law.

I have now to apply these principles. I had to see what was the evidence laid before me. I have not had all the time I should have desired, but I did not think that I was justified in adjourning until to-morrow morning. I have given the question as much conscientious and careful study as was possible under the circumstances, and with only about an hour and a half at my disposal; but I am satisfied that my knowledge of the evidence from having heard it and from my examination is sufficient to enable me to decide the question.

Before leaving the law on this question, I would refer to the American and English Encyclopedia of Law, under the words "Dying Declarations." There I read that the fact that the declarant believes himself in great danger, and entertains fear that he must die, is not sufficient to justify the admission of the declaration; if the deceased had the slightest hope of recovering when the declaration was made, it is inadmissible.

The rule respecting the admissibility of dying declarations, does not require that they should have been made while the sufferer was literally breathing his last; if the declaration was made under a sense of impending death, it does not matter whether death fails to occur until some time after the declaration was made, and the length of time between the making of the declaration and death is immaterial. The one element to be considered is whether the declaration was made under the sense of impending death.

The main thing, in order to make a declaration admissible in evidence, is that it has been made under a full sense of impending death, without any hope whatever of recovery.

[The learned Judge here referred to the evidence of the attending physician.]

I now come to the evidence of Acting-Detective Gallagher. The witness said:—

Q.—Did you ask him what his condition was when you went there?

A.—I asked him how he was.

Q.—What did he say?

A.—I am very bad.

Q.—Is that all he said?

A.—I am worse than anybody knows. When I came back I asked him: Did you get any better, and he said no. I don't think I will get better.

(I would here remark that he did not say: I am convinced that I am going to die).

Q.—Did the judge ask him how he was, and did he say: "I am feeling stronger than this morning"?

A.—Yes, he did.

Q.—Did he say: "I am feeling stronger. I think I am getting better"?

A.—I do not remember that. He said: "I am feeling stronger." He did not say: "I think I am getting better." I made no statement at all to the judge. I gave my deposition before the coroner, and in that deposition I stated that the sufferer had stated: "I am not going to die; I may get better. I am not going to die." Then, at the preliminary examination, I said in my deposition: when he was turned over he says: "I do not think I will get better." It was at that time that he mentioned that."

Now, in order to admit a dying declaration it is necessary that there should have been no hope whatever entertained by the declarant of his recovery; and the Judge, in order to admit it, must be satisfied that all the conditions required by the law exist. I cannot say that I am perfectly satisfied, and I must admit that I have great doubts whether those conditions exist in the present instance. From what the doctor told him, from

the encouragement he gave to him, it would seem that the deceased George Wellington Smith entertained a glimmer of hope at the time he spoke to the witness Gallagher. If there was even a glimmer of hope, the dying declaration which he is alleged to have made cannot be received. From the evidence it seems to me that the deceased may be said to have entertained some faint hopes that he might recover; there is nothing positive, and there being a doubt, the right to have the ante-mortem or dying declaration admitted in evidence is not established. That does not affect the previous dying declaration made at noon to his wife after he had entered the hospital. I must be perfectly satisfied, in my mind, that all the essential conditions existed at the time the second declaration was made. If I have a doubt, I cannot be satisfied, I am not satisfied, and I cannot, therefore, admit the declaration in evidence.

Under these circumstances I have to declare that the ante-mortem or dying declaration alleged to have been made to the witness Thomas Gallagher cannot be admitted in evidence.

The objection made by the defence is therefore maintained.

Declaration excluded.

J. P. Cooke, K.C., and Eugene Lafontaine, K.C., Crown prosecutors.

H. C. St-Pierre, K.C., and Donald Macmaster, K.C., counsel for the prisoner.

Note: Rejection of dying declarations—Statements shewing declarant's hope of recovery.

Declarations have been rejected after proof of the following expressions by the deceased:—

“I think myself in great danger” (*R. v. Errington*, 2 Lew. C.C. 148).
 “I was in hopes of getting better; but as I am getting worse, I think it my duty to mention what has taken place” (*R. v. Megson*, 9 C. & P. 420).
 “I think I shall not recover, as I am very ill” (*R. v. Spilsbury*, 7 C. & P. 187).
 “I think I shall never get over it” (*R. v. Qualter*, 6 Cox 357).
 “I don’t think I shall ever get up again. . . . I don’t think I shall be long with you. . . . I hope I shall get well, but do not think so. . . . I feel sure I shall never get up alive again. . . . I give the following directions

Note—Continued.

Rejection of dying declarations—Statements shewing declarant's hope of recovery. in case I die" (*R. v. Gloster*, 16 Cox 471). "I feel that I have received such an injury that I shall never recover;" and upon the doctor trying to cheer him, "I feel satisfied I shall never recover" (*R. v. Van Butchell*, 3 C. & P. 631). "I have no hope of recovering, unless it be the will of God" (*R. v. Murphy*, 1 Arm. M. & O. 206).

A doctor having told the deceased that there was "little or no hope of her recovery," the latter, on being asked if she understood her position, replied that she did—a declaration then made rejected (*R. v. Mitchell*, 17 Cox 503). So, where the deceased, having asked his doctor if the wound was necessarily mortal, was told that a recovery was just possible and in one such case had taken place, whereupon the deceased had replied, "I am satisfied" (*R. v. Christie*, Carr. C.L. 202).

The deceased having been told by the doctor that she would not recover, replied, "I hope, doctor, you will do what you can for me, for the sake of my family." Declaration then made rejected (*R. v. Crockett*, 4 C. & P. 544).

The deceased having made a statement which was taken down in writing by a third person, concluded, "I make the above statement with the fear of death before me, and with no hope of recovery." Afterwards, on the statement being read over to her, she corrected it to, "with no hope at present of my recovery." Declaration rejected (*R. v. Jenkins*, L.R. 1 C.C.R. 187).

The result of the decisions is that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die. As said by Chief Baron Kelly:—"If we look at reported cases and at the language of learned judges we find that one has used the expression, 'every hope of this world gone;' another, 'settled, hopeless expectation of death;' another, 'any hope of recovery, however slight, renders the evidence of such declarations inadmissible.' We, as judges, must be perfectly satisfied beyond all reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution. Per Kelly, C.B., in *R. v. Jenkins* (1869), L.R. 1 C.C. 187 (cited with approval by Hagarty, C.J., in *R. v. Smith* (1873), 23 U.C.C.P. 312).

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, McGUIRE AND WETMORE, JJ.

THE KING v. WAGNER.

Valuable security—Lien note—Cr. Code sec. 360.

1. A Lien note is a "valuable security" within the meaning of sec. 360 of the Criminal Code.

DECIDED: June 4, 1901.

This was a question of law reserved by SCOTT, J., for the opinion of the Court under section 743 of the Criminal Code, 1892. The defendant was tried before him at Edmonton on May 28th and 29th, 1901, upon the following charge:—

"That he, the said Philip Wagner, on the 8th day of February, A.D. 1901, unlawfully, knowingly and designedly did falsely pretend to one Hretzko Aronetz, the said Hretzko Aronetz being a Russian and unable to understand the English language, that a certain document which he, the said Hretzko Aronetz, was then through interpretation of him, the said Philip Wagner, called upon to sign, was merely a receipt or memorandum of agreement regarding the sale of a cow by one Frank Lafortune to him, the said Hretzko Aronetz, setting forth that if the cow was not as represented the money which he, the said Hretzko Aronetz, was then paying therefor, forty-five dollars, would be refunded to him, said forty-five dollars being made up of the sum of twenty dollars in cash then paid to the said Frank Lafortune, and the sum of twenty-five dollars due and owing by said Philip Wagner to said Hretzko Aronetz, and by him said Wagner agreed to be paid to the said Frank Lafortune, and did further falsely pretend that the said sum of twenty-five dollars was already paid to said Frank Lafortune, the said Lafortune being indebted to him, the said Wagner in that amount; by means of which false pretences the said

Philip Wagner did thereby unlawfully and fraudulently induce the said Hretzko Aronetz to sign a certain lien note in favour of the said Frank Lafortune for the sum of twenty-five dollars with intent thereby then to defraud and injure the said Hretzko Aronetz, whereas in truth and in fact the said document was, as the said Philip Wagner well knew, a lien note for the purpose of securing to the said Frank Lafortune the payment by the said Hretzko Aronetz of the sum of twenty-five dollars, being the money already held by the said Philip Wagner for the said Hretzko Aronetz in trust to pay the same to the said Frank Lafortune, and whereas in truth and in fact said Wagner had not paid said sum of twenty-five dollars to said Lafortune, nor was said Lafortune indebted to him, the said Wagner, in said amount."

The evidence established that the defendant with intent to defraud and injure the said Aronetz had by false pretences induced him to execute the following document, that is to say:

"\$25.00.

"Edmonton, N.W.T., 8th February, 1901.

"On or before the 8th day of April, 1901, for value received I promise to pay to Frank Lafortune or order the sum of twenty-five dollars at Edmonton, N.W.T., with interest at one per cent. per annum till due, and ten per cent. per annum after due until paid.

"Given for one cow six years old, branded horseshoe on rump, red cow, half of side white.

"The title ownership and right of possession of the property for which this note is given shall remain at my own risk until this note, or any renewal thereof, is fully paid with interest, and if I shall make default in payment of this, or any other note in their favour, or should I sell, or dispose of, or mortgage my landed property, or if they should consider this note insecure, they have full power to declare this, and all other notes made by me in their favour, due and payable forthwith, and they may take possession of the property and hold it until this note is paid, or sell the said property at public or private

sale, the proceeds thereof to be applied in reducing the amount unpaid thereon, and the holders hereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against me and recover, and I hereby agree to pay the balance then found to be due thereon."

Witness, P. Wagner.

G. W. B. Almon.

his

H. x Arontez.
mark.

The false pretence was that the defendant represented to said Aronetz that said document was merely a receipt or memorandum respecting the sale of a cow by said Lafortune to him, the said Arontez, setting forth that if the cow was not as represented the money which said Arontez was then paying therefor would be refunded to him.

At the conclusion of the trial the defendant was convicted of the offence charged, but sentence was reserved until 25th June, 1901.

The question reserved for the opinion of the Court was:—

Was the document referred to a valuable security within the meaning of section 360 of the Criminal Code, 1892?

REGINA, N.W.T., June 4, 1901.

T. C. Johnstone, for the Crown, referred to *Regina v. Scott* (1878), 2 Can. S.C.R. 349; *Regina v. Brady* (1866), 26 U.C.Q.B. 13; *Regina v. Rymal* (1889), 17 O.R. 227; *Regina v. Danger* (1857), Dears & B. C.C. 307; 3 Jur. (N.S.) 1011; 26 L.J.M.C. 185; 5 W.R. 738; 7 Cox C.C. 303.

No one appeared for the prisoner.

REGINA, N.W.T., June 4, 1901.

The judgment of the Court was delivered by

MCGUIRE, J.—By sec. 3, sub-sec. (cc.) the term "valuable security" is defined, and among the various writings thereby included under the term we find "any . . . note, warrant, order or other security for money or for payment of money."

his document is a "note"—meaning a "promissory note"—it is a valuable security, but even if not a "promissory note"—a point not necessary to decide—it is a document coming within the description "other security for money or for payment of money." It is a document in the nature of a "note" and is a "security for the payment of money." I think it comes also within the words of another part of sub-section (g) a "document of title to . . . goods as hereinbefore mentioned," that is, in sub-sec. (g), which includes a "document used in the ordinary course of business as proof of the possession or control of goods, authorizing . . . either by indorsement or by *delivery*, the possessor . . . to transfer or deliver the goods" mentioned. This document is one of a class in common use for the purposes just mentioned, and expressly authorizes the possessor of it, on certain conditions, to "take possession" of the chattel and "to sell" it. I think there is no doubt whatever that the signing and delivery of this document was the making of a "valuable security" within the meaning of section 360 of the Code.

Conviction affirmed.

[SUPREME COURT OF THE NORTH WEST TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, McGUIRE, SCOTT AND
WETMORE, JJ.

THE QUEEN v. DAVIDSON.

*Certiorari—Security—Deposit of cash without written condition—N.W.T.
Liquor License Ordinance—Keeping bar open during prohibited hours—
Want of allegation and proof of accused being a licensee—Preliminary
objections to certiorari—Time for—Cr. Code, sec. 892.*

1. Where a deposit of cash is made, under sec. 892 of the Code, or under N.W.T. Rule 13 of 1900, in lieu of a recognizance in certiorari proceedings to quash a summary conviction, it is not necessary that the applicant should file at the same time a written document setting forth the condition upon which the deposit is made.
2. Preliminary objections to a writ of certiorari removing a conviction must be raised promptly, and objections to matters of form in the certiorari proceedings will not be entertained on the motion to quash the conviction when three months have elapsed since the return, without a substantive motion being made to quash the writ.
3. Where the information does not allege that the defendant was a licensee, nor was proof adduced of the fact, a conviction for selling liquor during prohibited hours will be set aside.

ARGUED: July 16 and 18, 1900.

DECIDED: December 8, 1900.

THE information alleged that the defendant "proprietor of the Royal Hotel at Indian Head, did on Sunday, the 22nd day of October, A.D., 1899, unlawfully have his bar open and sold liquor during prohibited hours contrary to section 64 of the Liquor License Ordinance."

There was no evidence that the defendant was a licensee, or that the offence was committed in a place where intoxicating liquor was licensed to be sold. The defendant was convicted.

The notice of motion for *certiorari* specified that the application would be made "to a judge of the Supreme Court in and for the North-West Territories at the Court House in the Town of Regina," etc., and was signed by the defendant, but did not state upon whose behalf the application would be made. The defen-

dant deposited with the proper officer \$100 in cash pursuant to rule 13 of the Consolidated Rules of Court, 1895, [now rule 23 of the Consolidated Rules of Court, 1900] but such deposit was unaccompanied by any written document. The return to the writ of *certiorari* having been duly made, an order was made returnable before the Court *in banc* at Calgary on July 16th, 1900, calling on the justices and informant to show cause why the convicton should not be quashed on the ground that it was not alleged in the information, nor was there any evidence adduced, that the defendant was a licensee, nor was it alleged or proved that the offence was committed in a licensed place.

CALGARY, July 16 and 18, 1900.

Horace Harvey, Deputy Attorney-General, showed cause:—The defendant, who moves against the conviction on the ground of irregularity, must himself be regular: *Scott v. Burnham*, 3 U.C. Ch. Chs. Reps. 399. The proper security has not been given under rule 13 of the Consolidated Rules of Court, 1895, no condition having been filed. Whether the security is given by recognizance or by deposit of cash, it must be accompanied by a written condition. The notice of motion for *certiorari* does not state on whose behalf the application will be made, nor whether it will be to a Judge in Chambers or in Court. The order for *certiorari* should not have been made *ex parte* unless special circumstances were shown; but a summons or order *nisi* should have been taken out: *Ex parte Ross*, 1 Can. Cr. Cas. 153. Notice of the application should have been given to the Attorney-General. The writ of *certiorari* is not in the form, nor does it follow the terms of the order. No place is specified for the return, consequently the papers are not before the Court: *Regina v. Wehlan*, 45 U.C.Q.B. 396; *Regina v. McAllan*, 45 U.C.Q.B. 402. The objections are properly taken at this time: *Regina v. McAllan*, 45 U.C.Q.B. 402.

W. C. Hamilton, Q.C., for defendant:—If there were any irregularities the informant should have moved to quash the writ.

The proceedings, being before the Court, can be dealt with on this motion: *Regina v. Monaghan*, 2 Can. Cr. Cas. 488. The conviction is bad on the grounds taken in the order *nisi*: *Regina v. Henderson*, 4 Terr. L.R. 146; 2 Can. Cr. Cas. 364; *Regina v. Williams*, 8 Man. R. 342; *Regina v. Granus*, 5 Man. R. 153; *Regina v. Rodwell*, 5 O.R. 186; *Regina v. Fleming*, 15 C.L.T. 244.

REGINA, December 8, 1900.

ROULEAU, J.:—On the motion to make absolute the rule *nisi*, several preliminary objections were taken on behalf of the prosecution. First, that there was no proper security given under rule No. 13 of the Rules of Court [now Rule 23 of the Consolidated Rules, 1900]. It is admitted that there was \$100 in cash deposited with the Registrar of the Court for the purpose of this appeal; but it is objected that there was no writing with such deposit shewing that the amount was deposited with the condition to prosecute the motion and writ of *certiorari*.

I do not think it necessary under the statute and the rules. The cash deposit is in the hands of the registrar for the purposes provided by law; he could not use that money for any other purpose than for the purpose of this case. In the case of a recognizance, the law provides that the condition should be in writing, because the recognizance may require to be enforced by process of law; the same proceeding is not intended nor necessary when the security is in cash.

Secondly: that the notice does not give the name of the party who intends to apply; nor does it state whether the motion is to be made to the Court or to a Judge in Chambers.

I am of opinion that these objections are not well taken. Even if they were, there is a direct authority to prevent this Court now sustaining them. The case of *Regina v. Fordham*, 9 L.J.M.C. 1 A. & E. 73; 3 P. & D. 95; 4 Jur. 218, decides that after a writ of *certiorari* has issued, the objections should be raised by a substantive motion to quash the writ. This rule applies also to the other objections. It is a principle laid down in the case of

Regina v. The Inhabitants of Basingstoke, 19 L.J.M.C. 28; 3 New Sess. Cas. 693; 6 D. & L. 303, that the rules of practice require a prompt application for these objections to be given effect to. But when over three months have elapsed, as in this case, without objection having been taken after the case has been brought up, the preliminary facts must be taken to be admitted and the application is then too late.

It is taken as a ground in the rule *nisi* that it is not alleged in the information, nor was there any evidence adduced that the said Davidson was a person holding a license under the Liquor License Ordinance, nor was it alleged or proved that the offence was committed in a place where intoxicating liquor was licensed to be sold.

I held already in *Regina v. Henderson*, 4 Terr. L.R. 146; 2 Can. Cr. Cas. 364, that under sub-section 4 of section 64, which provides that no bar-room or room in which liquors are usually sold, in a licensed hotel, shall be kept open, etc., the prosecutor must either allege or prove that the defendant was a keeper of a licensed hotel, so as to make him liable under the provisions of the Liquor License Ordinance, 1891-92. I have no reason to change my views, which were based on the following authorities: *Regina v. Williams*, 8 Man. R. 342; Paley on Convictions, 126, and *Regina v. Rodwell*, 5 O.R. 186.

In this case I find that the information does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. I am of opinion, therefore, that the rule *nisi* should be made absolute and the conviction be quashed, with usual protection to the magistrates under section 891 of the Criminal Code.

WETMORE, J.:—In shewing cause against the rule *nisi* to quash the conviction herein, the learned counsel for the prosecution took a number of preliminary objections, and among others that no written document had been deposited with the registrar at the time the sum of \$100 was deposited with him or at any other time, stating the conditions upon which such deposit was made. It was made to appear to the Court by the certificate of

the registrar that \$100 cash, the security required by rule 13 of the then Consolidated Rules of Court, had been deposited in this matter with the registrar by the defendant, and that such sum stood to the credit of this matter in the Bank of Montreal, Regina. As a matter of fact, no such written document as the learned counsel contends ought to have been deposited was lodged. Section 892 of the Criminal Code, 1892, provides that, "The Court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction . . . before a justice and brought before such Court by *certiorari*, shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction . . . has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own cost and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction . . . is affirmed, his full costs and charges to be taxed."

In pursuance of that section of the Code this Court promulgated rule 13 referred to, whereby it was provided that no motion to quash a conviction before a justice and brought before the Court by *certiorari* shall be entertained unless the defendant is shewn to have entered into a recognizance in \$200, with one or more sufficient sureties, before a justice of the peace, and deposited the same with the registrar . . . or to have made a deposit with the said registrar . . . of \$100, in either case with a condition to prosecute such motion and writ of *certiorari*, etc. . . ." as set out in the section of the Act. It will be observed that the words "in either case" are inserted in the rule; they are not in the section of the Act. The Court in promulgating the rule must have been of the opinion not only that the condition referred to was to be the condition of the recognizance, but was also to be the condition of the cash deposit; and that, to my mind, was in

accordance with the intention of the section of the Code. I am not at all surprised that the idea has been conceived that a written document specifying the conditions subject to which the money was deposited should be lodged, and I am free to confess that for a time I was greatly impressed with that idea. On reflection, however, I have arrived at the conclusion that the rule has been substantially complied with. The defendant himself deposited the money with the registrar, and he deposited it in this matter. There was no other purpose for which he could deposit it in this matter or for which the registrar had authority to receive it, except as security under the rule, and that may fairly mean that he deposited the money subject to the condition prescribed by the rule. Moreover the registrar received the money as paid under the rule, and may fairly be held to have received and to hold it subject to such condition.

A number of other preliminary objections were taken, but in view of the length of time that the writ and return laid in the registrar's office before the motion was made for a rule *nisi* to quash (from March 2nd, 1900, to June 4th), and of the character of these objections, I am of opinion that they ought to have been urged by a substantive motion and ought not to be allowed to prevail at this stage of the proceedings, and to that extent I agree with my brother ROULEAU.

I also agree with my brother ROULEAU that the conviction should be quashed for the reasons stated by him.

RICHARDSON, MCGUIRE and SCOTT, JJ., concurred.

Conviction quashed.

Note: *Preliminary objections in certiorari proceedings.*

Where, on an application made after notice to the convicting justices for a rule for a certiorari, the rule was refused, and on a subsequent *ex parte* application on the same material the rule was obtained, it was held that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged. *R. v. McAllan* (1880), 45 U.C. Q.B. 402.

Note—Continued.***Preliminary objections in certiorari proceedings.***

When a whole term has elapsed without objection being made after the case has been brought up, a preliminary objection is then too late. *R. v. Basingstoke* (1849), 19 L.J.M.C. 28; *R. v. Whittaker* (1894), 24 Ont. R. 437.

Where the objection to the allowance of the certiorari is a substantial one, and the conviction not manifestly bad, there is no reason why the party should be precluded from raising it on the return of the rule to quash the conviction, instead of being driven to incur the expense of a special motion to quash the allowance.

Where, on the other hand, the objection is of a trivial or merely technical character (*R. v. Hoggard*, 30 U.C.Q.B. 152), the party may well be told that he would not be heard to raise it except in a strictly formal and technical way by a substantive motion to quash the writ; and a fortiori if the conviction was clearly bad and must inevitably be quashed, for in that case the recognizance would be of no avail to the respondent. Per Osler, J., *R. v. Cluff* (1882), 46 U.C.Q.B. 565.

In Nova Scotia where no step has been taken within a year a rule absolute in the first instance will be granted to quash a certiorari. *R. v. Renes* (1884), 17 N.S.R. 87 (following *City of Halifax v. Vibert*, 3 R. & C. 54).

Where a party obtaining an order nisi for a certiorari was directed by the judge to serve the prosecutor with copies of his affidavits and grounds on which the order was granted, but neglected to do so, the order was discharged. *Ex parte Doherty* (1887), 26 N.B.R. 390. A writ of certiorari not signed by the prothonotary will be quashed. *R. v. Ward* (1888), 21 N.S.R. 19.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE OSLER, MACLENNAN, MOSS AND GARROW, JJ.

THE KING v. TREVANE.

Preliminary enquiry—Full opportunity to cross-examine—Depositions as evidence—Cross-examination not finished through illness of witness—Waiver of right to continue—Cr. Code secs. 590, 687.

1. Where the cross-examination of a witness for the prosecution upon a preliminary enquiry is interrupted by the illness of the witness, and the magistrate, in the absence of the accused and of his counsel, afterwards obtains the witness' signature to the depositions, but neither the witness nor the prisoner's counsel re-attends the enquiry to complete the cross-examination, there has been no full opportunity to cross-examine so as to admit such depositions in evidence at the trial upon proof of the continued illness of the witness.
2. There was no waiver of the right to continue the cross-examination by the failure of prisoner's counsel to attend on the adjourned inquiry when the witness was not present or by the prisoner himself stating thereat that he had nothing to say.
3. A magistrate should not obtain a witness' signature to a deposition in the absence of the accused.

ARGUED : September 16, 1902.

DECIDED : September 18, 1902.

THIS was a case reserved by the County Court Judge's Criminal Court of the County of Lambton, as follows :—

"The following case is reserved and stated under section 743 of the Criminal Code by His Honour Daniel Fraser Macwatt, Esquire, Judge of the County Court of the County of Lambton.

On the 14th day of May, 1902, Conto Trevane was brought up for trial before the County Court Judge's Criminal Court for the County of Lambton upon the following accusation :—

"For that he the said Conto Trevane on the 22nd day of January in the year of our Lord 1902 at the Township of Brooke in the said County of Lambton indecently did assault Eva Oke a female."

And on the same day the said Conto Trevane was tried at the said court holden at the Town of Sarnia and was convicted of the offence charged, and judgment on the said conviction was postponed until the questions hereinafter stated should be decided.

The said Conto Trevane is in prison in the common gaol for the County of Lambton.

The questions reserved for the consideration of the court are—

(1) Were the depositions taken before P. A. McDiarmid, Esquire, J.P., the committing magistrate on the 25th day of February, 1902, properly received in evidence, they having been taken under the following circumstances?

The prosecutrix having become ill during her examination begun on the 25th February, 1902, after her cross-examination had proceeded for some time, an adjournment was taken until the 27th February, 1902, in the presence of the counsel for the prisoner, yet he did not attend upon such adjournment, and I considered he then waived his right to further cross-examination; and that in any case the certificates on the depositions governed.

(2) Did the evidence support a charge under section 259 and sub-sections (a) and (b)?

If the Court should be of opinion that such questions or either of them should be answered in the negative then the conviction should be set aside and the accused acquitted.

A transcript of the said depositions and of the evidence taken at the trial are hereunto annexed and certified.

Dated at Sarnia the 31st day of May, 1902.

(Signed) "D. F. MACWATT,"

Judge of the County Court of the
County of Lambton.

(Signed) "JUNIUS J. BUCKE,"

Clerk of the Peace and County Crown Attorney
County of Lambton.

TORONTO, September 16th, 1902.

W. J. Tremear, for the prisoner, relied upon sec. 687 of the Criminal Code 1892, and contended that there had been no proper opportunity to cross-examine; that a full opportunity of cross-examination is requisite, even though what was given was as full as the condition of the witness' health allowed: *The Queen v. Mitchell* (1892), 56 J.P. 218; *Reg. v. Prestridge* (1881), 72 L.T. Journal 94; he also referred to sec. 590 of the Criminal Code as to be read with sec. 687; and contended that even were the disputed evidence admissible, no offence had been made out under sec. 259 as to indecent assault.

F. Ford, for the Crown, contended that there had been full opportunity to cross-examine, but that the prisoner's counsel withdrew from the case; that he had waived his right to cross-examine; and that an offence under sec. 259 had been committed.

Tremear, in reply.

TORONTO, September 18, 1902.

The judgment of the Court was delivered by

OSLER, J.A.:—

The prisoner was charged on February 25th, 1902, before a magistrate with having committed an indecent assault upon a female. The preliminary inquiry was begun at the house of the girl's father, where she was residing. The prisoner was represented by counsel, but before her cross-examination was concluded it became necessary, owing to her illness, to adjourn the proceedings, and they were adjourned accordingly until February 27th. In the meantime the magistrate consulted the County Crown Attorney with reference to the charge, and on hearing from him, telegraphed to the prisoner's counsel that he had got Mr. Bucke's opinion, and the case would have to go to Sarnia, and asked counsel to telegraph in reply whether he would come up or not. Counsel, taking this as an intimation that the accused would be committed for trial, telephoned the

magistrate that if he intended to send the prisoner to Sarnia at any rate, there would be no use in his coming, and accordingly he did not appear at the subsequent proceedings. On the morning of the 27th the magistrate went out to where the girl was residing and obtained her signature to her deposition as it had then been taken down, the prisoner not being present or represented, and, in the afternoon, resumed the inquiry at his own office in Alvington. The accused was present, but not the witness, whose examination had been interrupted at the first meeting. Prisoner was asked if he had anything to say. He replied, nothing; and on the evidence as already taken, was committed for trial.

At the trial it was proved that the girl was so ill as not to be able to travel, and her deposition, taken and signed as above mentioned, was tendered by the Crown and admitted in evidence, contrary to objection. The first question submitted to the Court by the county Judge is whether under these circumstances as they appear by the evidence taken at the trial and returned with the special case, the deposition was properly received in evidence.

The learned county Judge reports that he considered the prisoner's counsel had waived his right to further cross-examination, and that in any case the certificate on the depositions governed.

The 687th section of the Criminal Code, as amended by the Criminal Code Amendment Act, 1900, 63-64 Vict. ch. 46 (D.), enacts that: "If upon the trial of an accused person such facts are proved upon the oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person, is dead or so ill as not to be able to travel . . . and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the Judge or justice before whom the same purports

to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such certificate was not in fact signed by the Judge or justice purporting to have signed the same."

In order, therefore, to introduce as evidence in the prosecution the deposition of a witness taken at the preliminary inquiry, who is unable by reason of illness to attend and give evidence in person at the trial, three facts must be made to appear: (1) that the witness is so ill as not to be able to travel; (2) that the deposition was *taken* (as to which see sec. 590 of the Code) in presence of the accused; and (3) that his counsel or solicitor had a full opportunity of cross-examining the witness. These conditions being proved by evidence *aliunde* the deposition, *then*, if the deposition *purports to be* signed by the justice, it shall be read in evidence in the prosecution.

It is not necessary in this case to discuss the question whether the deposition of a witness, on an enquiry where the accused has not been represented by counsel at all, can be admitted as evidence under this section as now amended. What is relied upon by the Crown is that at one stage of the enquiry counsel did appear and entered upon the cross-examination, and then waived his right to cross-examine further.

Through no fault, however, of his or of the accused, but solely in consequence of the illness of the witness, the cross-examination was interrupted, and the enquiry was necessarily adjourned, and counsel — for what reason, I think, it does not matter in point of law—did not attend again. It does appear that it was because he thought it would be unnecessary or useless to do so as the magistrate had determined to commit the accused to trial. The cross-examination never was in fact completed. It had been interrupted at the most critical and important stage of it, and the witness and accused were never brought face to face together again. The magistrate, most irregularly, obtained the signature of the witness to her

incomplete deposition in the absence of the prisoner, afterwards, on this incomplete deposition, the witness not being present, committed him for trial. Plainly, therefore, it is impossible to say that the prisoner's counsel, not to say the prisoner himself, ever had a full opportunity of cross-examining the witness. I see no pretence for saying that he waived it.

Even, however, if the inquiry had closed on the first cross-examination, I should have thought that the deposition disclosed on its face that there had not been a full opportunity of cross-examining the witness, as the magistrate interfered with the prisoner's counsel and prevented questions being answered which, however painful to all parties concerned, were entirely pertinent and necessary to elucidate the vital point of the defence.

The first question submitted by the special case must, therefore, be answered in the negative, viz., that the deposition was not properly received in evidence, and as there is no other evidence on which the conviction can be supported, it must be set aside and the prisoner discharged.

It is not necessary to answer the other question whether the evidence would, if admissible, have supported a charge under sec. 259, sub-secs. (a) and (b) of the Code.

Conviction quashed.

Note: Full opportunity to cross-examine—Cr. Code sec. 687.

R. v. Prestidge et al. (1881), 72 Law Times Journal 93, was a prosecution for murder tried before Sir Henry Hawkins. While the deceased was in a precarious condition, a magistrate attended at her bedside and took her deposition in the presence of the accused, pursuant to the provisions of the Criminal Law Amendment Act of 1867 (30 & 31 Vict. Imp., ch. 35, sec. 6). It appeared that after the woman had given her testimony and had been cross-examined, the magistrate proceeded to put certain other questions, and elicited facts of a most material character which were duly added to the depositions. On cross-examination of the magistrate, who was called as a witness at the trial, it was elicited that the prisoners had no opportunity of cross-examining on the new matter. Hawkins, J., on objection being taken, ruled that this portion of the deposition was inadmissible.

In *The Queen v. Mitchell* (1892), 56 J.P. 218, the indictment was against a woman for murder by performing a criminal operation upon another woman. Notice had been given to the prisoner that it was intended

*Note—Continued.**Full opportunity to cross-examine—Cr. Code sec. 687.*

to take the statement of the dying woman under 30 & 31 Vict. (Imp.) ch. 35, sec. 6, and such statement was taken in the presence of the prisoner and her solicitor; but after the cross-examination by the prisoner's solicitor had continued for a short time, the magistrate who was taking the statement declined to allow the examination to proceed, on the ground of the condition of the dying woman. The statement had been held inadmissible as a dying declaration, and was then tendered as evidence by the prosecution, on the ground that the prisoner had had as full an opportunity for cross-examination as the circumstances allowed, and also upon the ground that it was admissible as a statement made in the presence of the prisoner, upon the authority of *R. v. Mann*, 49 J.P. 743. Mr. Justice Cave, at the Nottingham Assizes, held that the document was not admissible as evidence on either ground. He said:—

“In order that a deposition should be admissible under 30 & 31 Vict. ch. 35, sec. 6, it was necessary that the prisoner should have full opportunity of cross-examining the person making the statement; and where the examination was closed by the magistrate declining to allow it to proceed, it was impossible to say that such full opportunity was given, unless it could be shewn that the person representing the prisoner was putting vexatious and frivolous questions with the object of compelling the magistrate to close the inquiry and of so evading the statute. In this case there was no evidence that this was so. As to the suggestion that it was admissible as a statement made in the presence of the prisoner, the whole ground of the admission of such statements was that if a charge be made in the presence of a person and he does not immediately deny it, the absence of such denial is some proof of the truth of the charge; but when the charge is made in such circumstances that the prisoner cannot reply, it would be absurd to say that the absence of the denial is of any value. In this case the prisoner was represented by a solicitor, and would not have been allowed to interrupt the proceedings by starting up and denying each allegation as it was made. Notwithstanding, therefore, the case of *R. v. Mann*, which he thought must have been misreported, he was clearly of opinion that the statement was not admissible in evidence.”

[COURT OF GENERAL SESSIONS, COUNTY OF YORK
ONTARIO.]

BEFORE HIS HONOUR JOSEPH E. McDOUGALL, COUNTY JUDGE AND
CHAIRMAN OF SESSIONS.

THE KING v. WARREN WILSON.

Extortion by threats—Threatening to accuse physician of having procured an abortion—Demand justified as made only for separate civil claim—Proof of claim inadmissible in defence—Cr. Code sec. 405.

1. Where the prisoner is being tried on a charge of having, with intent to extort money, accused or threatened to accuse a physician of having procured an abortion on the prisoner's wife, the evidence for the prosecution being to the effect that the demand for the money was on a claim of seduction as well as abortion, and the defence claiming that the demand was respect of the seduction only, evidence is not admissible on behalf of the defence to prove that the charge of seduction was true.

DECIDED : October 29, 1902.

AN indictment was found at the York Sessions against Warren Wilson under sec. 405 (a) of the Criminal Code, charging in effect that Warren Wilson had with intent to extort gain \$5,000.00 from Dr. R. L. Langstaff, of Richmond Hill, accused and threatened to accuse Dr. Langstaff of an offer punishable with imprisonment for life, namely, with having committed the criminal offence of procuring the abortion of the wife of the accused Warren Wilson.

The case for the Crown was, in brief, that Wilson had gone to Langstaff's office on March 17th last, and after preliminary conversation charged Langstaff both with procuring an abortion upon and having connection with his wife; he demanded \$5,000.00 and afterwards \$3,000.00 and threatened to expose Langstaff if the latter did not pay, saying that he would see a lawyer, and state to the lawyer what he then told Langstaff, as the making it public would thus ruin Langstaff. These threats in substance were said to have been repeated at a subsequent interview in Toronto, had in pursuance of a letter from Wilson to Langstaff, making an appointment to meet in Toronto, at which

interview Wilson claimed \$5,000.00 instead of \$3,000.00 previously discussed. On behalf of the Crown it was admitted, and the case was so opened to the Jury, that the charge could not alone, but the case was pressed upon the abortion branch solely, because the threat and demand related equally to the charge of abortion as to the alleged seduction.

It was clear that the demand of \$5,000.00 had been made and there was no denial of this fact, the defence being that the only demand and threat made was as to the seduction which would not constitute the offence charged or any criminal offence and it was denied that any claim or threat had been made by reason of the alleged abortion.

TORONTO, October 29, 1902.

E. F. B. Johnston, K.C., for the prisoner, proposed to adduce for the defence evidence, including that of the prisoner's wife, to shew that Dr. Langstaff had seduced Mrs. Wilson and that there was a *bona fide* ground for the money demand made by Wilson on that ground. This evidence was submitted under the authority of *Rex v. Richards* (1868), 11 Cox C.C. 43, as being admissible to shew what was the intention of the prisoner in demanding money, namely, to shew the existence of a civil claim which might properly be compromised. The same argument was indirectly urged as to the right to give evidence of the fact that Dr. Langstaff had performed an abortion or abortions upon Mrs. Wilson. It was suggested that evidence of the abortion being performed would be admissible on the question whether the intent was to extort money or merely to compound an indictable offence.

Dewart, K.C., on behalf of the Crown urged that the evidence tendered should not be admitted because the words of the Statute were clear, namely, "whether the person accused or threatened with accusation is guilty or not"; that in any event the evidence of the fact of seduction was not admissible on this issue; that the character of the negotiations in the *Richards'*

Case differed from this case, as here \$5,000.00 admittedly demanded but the defence in the present case alleged that demand was for another matter entirely. He also urged *Rex v. Gardiner* (1824), 1 C. & P. 479, and *R. v. Cra* (1866), 10 Cox C.C. 408, should be followed.

McDOUGALL, Co. J., said he would follow the two cases referred to, and declined to admit the evidence tendered.

The jury disagreed and the case stands to be again tried at a future sittings.

Note: *Threatening to accuse with intent to extort—Truth of charge Code, sec. 405.*

The King v. James Gardner (1824) 1 C. & P. 479, was a trial on an indictment for robbery coming on at the Gloucester Assizes before Little. The prosecutor proved that the prisoner obtained his money by threatening to accuse him of an unnatural crime. The prisoner's defence was that the prosecutor had made an attempt to commit such a crime, and had thereby given him the money not to prosecute him for it.

Little, J., ruled that it was equally a robbery to obtain money by intimidating him with a threat of an accusation of an innocent crime, whether the prosecutor was really guilty of the crime or not. If he was guilty, the prisoner ought to have prosecuted him for it, and have extorted money from him; but, if the money was given voluntarily and without any previous threat, the indictment could not be supported. The jury found the prisoner not guilty.

In *The Queen v. Cracknell and Walker* (1866) 10 Cox C.C. 408, the prisoner was found guilty of feloniously threatening to accuse of an infamous crime in order to extort money.

Willes, J., presiding at the Central Criminal Court, held that the guilt or innocence of the party threatened is quite immaterial to the issue, that, although the prosecutor may be cross-examined with a view to prove that he is really guilty of the offence imputed to him, yet no evidence shall be allowed to be given, even in cross-examination, by another witness to prove that the prosecutor is really guilty.

In *The Queen v. Richards* (1868), 11 Cox C.C. 43, the prisoner was indicted under sec. 47 of 24 & 25 Vict., Imp., c. 96, for threatening to accuse the prosecutor of an infamous crime, with a view to extort money, and the trial resulted in a verdict of not guilty. The facts proved were that the prisoner had been informed by his son that the prosecutor had contracted the venereal disease to him by Sodomite practices; that the prisoner, in fact, the disease; that the prisoner thereupon went to the prosecutor and at first demanded payment of the doctor's bill, amounting to 25 sh.

Note—Continued.

Threatening to accuse with intent to extort—Truth of charge—Cr. Code, sec. 405.

but some time afterwards threatened to give him into custody unless he would compromise it by payment of 100*l*. Blackburn, J., at the Exeter Assizes, told the jury that whether the crime of which the prisoner was accused by the prosecutor was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money; but that it was material in considering what was the intention of the prisoner in demanding the money.

He continued:—

“If the prisoner believed the statement of his son, and, acting on that belief, went to the prosecutor and accused him of the crime, but without any purpose at that time to extort money by such accusation, he had not been guilty of the offence laid in this indictment; and if, after the accusation is made, *with a belief of its truth* the prisoner endeavored to compromise it by payment of money, he might be guilty of the offence of compounding a felony, but he would not be guilty of obtaining money by threats.”

The section of the Imperial statute under which the prosecution of *Richards* was brought, 24 & 25 Vict., c. 96, s. 47, is as follows:—

“Whosoever shall accuse or threaten to accuse either the person to whom such accusation or threat shall be made, or any other person of any of the infamous or other crimes lastly hereinbefore mentioned [*i.e.*, in the preceding sec. 46, which relates to letters or writings threatening to accuse of infamous crime], with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused, or threatened to be accused, or from any other person, any property, chattel, money, valuable security or other valuable thing, shall be guilty of felony, and being convicted thereof, shall be liable,” etc., etc.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

THE KING v. LAURIN (No. 5).

Contradicting one's own witness—Other relevant testimony admissible although inconsistent—Witness hostile or adverse—Refreshing the memory—Previous depositions on preliminary enquiry—Procedure—Right of cross-examination on deposition produced to refresh memory of witness—Cr. Code secs. 699, 700.

1. The party on whose behalf a witness is called is not debarred by Code sec. 699 from proving by other witnesses any relevant facts inconsistent with or contradictory of such witness's testimony without a ruling that the witness is hostile to the party calling him.
2. The witness's deposition at the preliminary enquiry may be shewn to him on his examination in chief at the trial for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud.
3. On the witness silently reading his previous deposition, a question, which had been put to the witness before he saw the deposition, and to which he had given an unexpected answer, may be re-put; and only in case the witness, after his memory has been so refreshed, persists in the same unexpected answer, can the question be repeated to him in a leading form from the depositions.
4. The opposite party is entitled to cross-examine not only upon the examination in chief but upon the previous depositions which had been so shewn to the witness for the purpose of refreshing his memory.

DECIDED: March 19, 1902.

The prisoner was on his trial on the charge of having murdered one George Wellington Smith, a coloured man who was employed by his father as one of his grooms, on the morning of Sunday, the 26th day of January, 1902.

Detective Ferdinand Guerin was under examination as one of the witnesses for the Crown, and had been questioned about an admission which had been made by the prisoner in his presence in the central police station on the morning of the 27th day of January, 1902, being the morning after the deceased had been shot; as the answer given by the witness was not what the Crown prosecutor expected, he referred to

the deposition which the witness had given at the preliminary inquiry, for the purpose of refreshing his memory, and was proceeding to read a part of it when Mr. St. Pierre, K.C., of counsel for the prisoner, objected to this course, contending that the deposition could be shewn to the witness and that the part referred to could be indicated to him, but that such a deposition could only be read when on cross-examination it was proposed to contradict a witness, and he also objected to the form of the question.

MONTREAL, March 19, 1902.

WURTELE, J.—Yesterday afternoon, in proceeding with the examination of the witness Guerin, the Crown prosecutor put the following question:—

“I see by your deposition given before the magistrate at the preliminary inquiry, at page 11, that you said that the prisoner had stated, ‘When I fired the first shot, I thought that I had not hit him, because he did not grow pale or white; but I fired another shot, and then he commenced to grow weak. Then I thought that I had hit him.’ Will you state to the Court, after having heard the reading of that evidence, whether you persist in the answer you gave in the Court below?”

The question was objected to by the counsel for the prisoner for the following reasons:—First: If the question is put for the purpose of refreshing the witness’s memory, that is not the way to do it, inasmuch as the question now put is a leading question. Secondly: Because the mode of action in cases of this sort is indicated by art. 699 of the Cr. Code, and also by art. 700; the witness cannot be asked as to whether he made a different statement before; he must be asked if he still persists in the same statement; if the sole object of the question is to refresh the witness’s memory, he has no right to do it at all.

The question before the Court is therefore whether the

memory of a witness for the Crown can be refreshed by a reference to a deposition which had been previously given by him.

Counsel for the defence referred to art. 699 and also to art. 700 of our Cr. Code. This last article provides that a witness may be cross-examined as to a previous statement made by him in writing, or which has been reduced to writing, relative to the subject matter of the case, without such writing being shewn to him; but if it is intended to contradict him by it, that his attention must be called to those parts which are to be used to contradict the evidence given by him at the trial, before such contradictory proof can be put before the jury. This article provides for the contradiction on cross-examination of the evidence which a witness has just given at the trial, but does not refer to the refreshing of his memory, and it therefore does not apply in the present instance. The previous art. 699 states that a party who produces a witness is not allowed to impeach his credit by general evidence of bad character, unless in the opinion of the Court he is adverse, when he may be contradicted by other evidence, or it may be proved, by leave of the Court, that he made at another time a statement inconsistent with the evidence just given at the trial. The article is of general application, and refers to witnesses called not only by the Crown, but also by the defence. Whether the witness be produced by the Crown or by the defence, it is not permissible to impeach his credit by general evidence of bad character; but if, in the opinion of the Court, such witness proves adverse (and adverse is held to mean "hostile"), the party who has called him may contradict him by other evidence, or, by leave of the Court, may prove that the witness made at another time a statement inconsistent with the testimony which has been then given at the trial.

The party therefore who produces a witness has no right to impeach his credit as a witness by general evidence of bad character, nor can he contradict him by other evidence, unless the Court is of opinion that the witness is hostile. But while art. 699 lays down the principle that a party cannot contradict

his own witness, it means that he can not be contradicted directly; there is no law to prevent the truth being shewn and made known in a case. What we seek for here is the truth. Certain rules, of course, exist to secure regularity, and have to be applied as to the manner in which evidence is to be given; but the main object of the researches and investigation of the Court is to ascertain and discern where the truth lies, is to discover and ascertain the truth. If, therefore, a witness makes a statement which the party who has called him knows to be directly, unless the Court is of opinion that the witness is hostile, that he has shewn by his demeanour, or by the way in which he has given his evidence, that he has some ill-will or bad feeling against the party who has called him, although he cannot do so directly, he may contradict him indirectly; that is to say, the party who has produced him, is not debarred, in the interest of truth and justice, from producing other witnesses, not for the express purpose of contradicting his witness, but to establish the truth by other distinct and independent evidence.

Neither art. 699 nor art. 700 apply to the case which is now under consideration.

The object which the Crown prosecutor had in producing the deposition of Detective Guerin, which had been taken before the committing magistrate, was simply for the purpose of refreshing his memory. There is a great difference between contradicting a witness and refreshing his memory, bringing things more clearly to his mind, so that he may be in a better position to testify to the truth. The law only prohibits any direct contradiction, unless the witness appears to be hostile. In this case I am of opinion that the witness is not hostile; I do not think that he came here with the idea or intention of giving evidence against the prisoner, and I believe that he came here with the desire and intention of testifying the truth. He is not a hostile witness, and therefore art. 699 does not apply, and he cannot be contradicted directly under its purview. There is, however, no law which can prevent the Crown prosecutor

from refreshing the witness's memory, so that he may be in a better position to testify to the truth.

How is this to be done? While a witness's memory may be refreshed, it has to be done according to the practice followed in England, and indicated by the rulings of the judges. In the case of *The Queen v. Beardmore*, 8 Carrington & Payne, p. 260, where an accomplice, who could not read, had made a statement before the committing magistrate, and at the trial gave evidence differing from what he had said before the magistrate, the Judge allowed his deposition to be shewn to him, but would not allow his deposition to be read to him by the officer of the Court. The attorney for the prosecution asked that the deposition should be read to the witness by the officer of the Court, with a view of founding questions upon it, but Baron Gurney said: "I cannot permit his deposition to be read to him, at the instance of the prosecution." The deposition was not read, but it was put into his hands, and if he had known how to read, he could have taken communication of it.

I refer, in the next place, to the case of *The Queen v. Williams*, 6 Cox, p. 343. It was held, in that case, that where a witness for the prosecution has given a different answer, on examination in chief to that which was expected, his deposition before the coroner, or before the committing magistrate, may be put in his hands for the purpose of refreshing his memory, and the question may then be put to him. If the witness persists, after his memory has been so refreshed, in giving the same answer as before, the question may be repeated to him from the deposition in a leading form. A witness for the prosecution having replied in the negative to the question whether he saw anything done to the deceased after he was on the ground, the attorney for the prosecution proposed to put the deposition of the witness which had been taken at the coroner's inquest, into his hands, and this was objected to by the prisoner's counsel.

Mr. Justice Williams then said:—"This very point was raised before me on the Welsh circuit, where a witness gave

evidence different from what was expected. I thought it a point of some difficulty, but I admitted it to be done on the ground of refreshing the memory of the witness, and the Court of Queen's Bench afterwards held that I was right." The deposition was then put in the hands of the witness, who looked at it, and the same question being repeated, he still answered, "I did not." A question was then put to the witness in leading form. This was objected to, but the objection was overruled, the Judge observing that, after refreshing the witness's memory and failing, there was no objection to putting questions in the form proposed. Then the witness was asked:—"After the deceased fell, did you see persons kicking and beating him?" And he answered, "I did not." The Judge subsequently referred to Russell on Crimes, by Greaves, vol. 2, p. 897, and observed that what he had then decided was not new law.

In Stephen's Digest, I find that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction, or a short time after, when it was likely that the transaction was fresh in his memory, and that he may also refer to any such writing made by any other person and read by such witness, if, when he read it, he ascertained and knew it to be correct. Such writing must be produced and shewn to the adverse party, if he requires it, and he has the right of cross-examining the witness upon it.

The result of these authorities is that a witness for the Crown, on examination in chief, may have his memory refreshed by the Crown, not by reading his previous deposition to him, but by putting such deposition in his hands, and calling his attention to the part of it which contains his previous answers, that is to the part of the deposition in which the subject-matter of his last answer is referred to, but in a different way.

The deposition cannot be used by the Crown or the defence as part of the evidence in the case, and it must not be read to the jury. It can only be used for the purpose of refreshing the witness's memory, and for nothing else. But the adverse

party may, if he wishes, cross-examine not only upon the testimony given before the Court at the trial, but also upon what is mentioned and set forth in the deposition which has been shewn to the witness for the purpose of refreshing his memory. The deposition can only be shewn to him, and must not be read out. He should read it himself, and then the Crown prosecutor may proceed to put questions referring to his previous answer, in order that the witness may either explain, or may, if he made an error, correct that error and explain how it occurred; or he may declare that he persists in the answer which he previously gave before the Court.

The form of the question, as put, is not in accordance with the principles which I now lay down, and therefore I maintain the objection merely so far as relates to the form of the question as put, and I also order that the deposition must not be read out. I therefore disallow the question as put; but I will allow the Crown prosecutor to put the deposition in the hands of the witness and to draw his attention to the particular passage which he wishes him to take communication of, and then to proceed with his examination according to the practice which has been established and is followed.

Objection allowed.

[COUNTY COURT OF VICTORIA, B.C.]

BEFORE THE HONOURABLE MR. JUSTICE MARTIN, A JUDGE OF THE
SUPREME COURT SITTING AS A COUNTY COURT JUDGE.

THE KING v. NEUBERGER.

*Summary conviction—Immediate payment of fine—No right of appeal—Deposit
in lieu of recognizance—Requisites of—Return by justice to appellate court
—Crim. Code, secs. 879, 880, 888.*

1. A defendant fined in a summary conviction proceeding who thereupon pays the fine to the clerk of the court instead of giving a recognizance or applying to the justice under Code sec. 880 (c) to fix the deposit on appeal, loses his right of appeal under secs. 879 and 880, notwithstanding that the magistrate afterwards fixed the amount of deposit for the costs only and such deposit was made and transmitted to the appellate court with the conviction.
2. The deposit authorized by Code sec. 880 (c) in lieu of a recognizance on appeal from a summary conviction must include the fine, and the whole sum covering both the fine and the probable costs of appeal must be transmitted to the appellate court.
3. *Semble*, the duty is upon the appellant to obtain the justice's return of such deposit to the appellate court under Code sec. 888, and unless such return is made the appeal must be quashed.

ARGUED: October 10, 1902.

DECIDED: October 10, 1902.

APPEAL to the County Court from a summary conviction by the Police Magistrate of the City of Victoria under the Indian Act, whereby the appellant was convicted and fined on 2nd July 1902, \$250.00 for selling liquor to an Indian. The appellant forthwith paid the amount of the fine to the Clerk of the Court, and on 31st July (within the thirty days mentioned in section 108 of the Indian Act) gave notice of appeal for the first sitting of the Court, and applied to the Magistrate to state the amount deemed by him sufficient to cover the costs of appeal. On 10th September the Magistrate fixed the sum at \$50.00, which, on 8th October, was paid by the appellant to the Magistrate and by him paid into the County Court the same day. The amount of the fine was paid into the City Treasury, and was not paid into the County Court as part of the deposit as required by section 888 of the Code.

VICTORIA, B.C., October 10, 1902.

Harold Robertson, for respondent, took the preliminary objection that the appeal had not been properly lodged. The amount of the fine was not paid to the convicting Justice, but to the Clerk of the Court, and the amount of the fine, \$250.00, together with the amount deposited for security for costs was not paid into the County Court as required by section 888 of the Code, and so the amount of the fine is not before this Court now as contemplated by said section, but only the \$50.00 security. He cited *The Queen v. Gray* (1900), 5 Can. Cr. Cas. 24. The appellant should either have stayed in jail, entered into recognizances, or paid with the amount of the fine the sum required for the costs of the appeal, but having elected to pay his fine he is concluded from appealing.

G. E. Powell, for appellant: Section 880 only refers to a man in custody, and where the convicted person has paid his fine instant, the amount required for security for costs may be paid at any time before the return day.

Section 888 imposes a duty on the Magistrate to make the return, and the appellant should not be prejudiced by reason of his failure to do so. The Magistrate never fixed the amount of security until 10th September, although requested to do so within the time limited for appealing. If necessary, I now ask for adjournment to enable the Magistrate to pay the amount of the fine into Court.

As to the contention that it must be paid simultaneously with the fine, the Act does not say so, and the Act should be construed broadly and so as to facilitate appeal. He cited *Regina v. McGauley* (1887), 12 P.R. 259, and *Stanhope v. Thorsby* (1886), L.R. 1 C.P. 423.

VICTORIA, October 10, 1902.

MARTIN, J.:—Even if the objection to the failure to make the deposit as directed by section 888 can be got over, and I am inclined to think it can not, the only right of appeal exists under

section 880. If, therefore, the defendant's counsel is right in contending that section 880 does not apply, no right of appeal exists at all. It is not contended that there is here any provision in any special Act which can take this case out of the opening words of section 880. Further, in my opinion, the objection should prevail, that the defendant having paid his fine with the intention of so doing, this appeal does not come within the purview of section 880.

Appeal quashed with costs.

[COURT OF QUEEN'S BENCH, QUEBEC.]
(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE HALL, J.

THE QUEEN v. JOSEPH.

Summary conviction—Joint appeal by several defendants—Recognizance—Two sureties essential—Crim. Code secs. 879, 880.

1. On a joint appeal, under sec. 879 of the Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellants, and the appeal will be quashed if the recognizance be given with only one surety.
2. An appeal not being a common law right, the conditions precedent imposed by the statute must be strictly complied with.
3. The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing and the conviction may be prosecuted as if no notice had been given.

MONTREAL, December 13, 1900.

HALL, J.—The appellants, Joseph *et al.*, were convicted before the police magistrate on the 4th October, 1900, of having unlawfully affixed a trade-mark, and were condemned to pay a fine of \$25 and costs, and in default of payment to be imprisoned for three months. On October 10th, appellant's counsel gave notice of appeal, under the provisions of section

879 of the Criminal Code, to the Court of Queen's Bench, November term, such notice being served upon the trial magistrate and upon counsel for respondent Gagnon.

The November term continued through the whole of that month and into December, and appeal cases were not reached until the 13th of the last named month. It was only on the 11th of December that the appellants entered into the usual recognizance to appear and try said appeal, and furnished the security bond of one person in addition to their own.

Upon the case being reached respondent's counsel moved that the appeal be dismissed on the ground that security had not been furnished within the time nor to the extent stipulated: Criminal Code, sec. 880.

An appeal is not a general or common law right. It is an exceptional provision enacted by statute, and, to be availed of, the conditions imposed by the statute must be strictly complied with. They and all of them are conditions precedent. A notice that the persons convicted intend to appeal is not an appeal. It is an idle formality if not accompanied either by the surrender of the accused into custody or by their entering into recognizance with two sufficient sureties that they will try the appeal and abide the judgment of the Court thereon, and pay such costs as may be awarded against them. I have no doubt that the conviction could have been validly prosecuted against the accused during all this interval, and they have no more rights as appellants before this Court than they have had, if they had omitted to give notice of appeal within the stipulated delay, or had, in fact, ignored all the conditions which the statute attached as conditions precedent to a right of appeal. The security bond is a part of the appeal, and in my opinion the most essential part of it. I refer to Chitty's General Practice,

vol. 2, p. 315. See also Encyclopædia of Pleading and Practice, *vb*o. "Appeals," vol. 2, pp. 238 and 244.

Appeal quashed.

Cooke, K.C., and *Perron*, for the prosecution.

Quinn, K.C., and *Jacobs*, for the defence.

Note: Perfection of appeals.

Where an appeal bond or transcript is required to be filed, or any other act to be done within the time named in the statute as a prerequisite to the perfection of an appeal, the mere "taking" of an appeal by service of notice does not render the appeal effectual for any purpose until such statutory prerequisites are complied with. 2 Encyc. Pl. & Prac. 234.

As the statutory time is deemed jurisdictional, it is generally held that an express or implied consent of parties cannot validate an appeal taken beyond its termination. This is so because the statute is not for the benefit of the party to the record alone, but for the public good and the ordinary administration of justice. 2 Encyc. Pl. & Prac. 244. In New York, however, the contrary is held. *Bagley v. Jennings*, 58 Hun. (N.Y.) 57. *Pearson v. Lovejoy*, 53 Barb. (N.Y.) 407; *Staats v. Garrett*, 98 N.Y. 630.

No court or judge can extend the statutory time for taking an appeal, except where the statute so authorizes. Where the time is fixed by a rule of the appellate court it may be extended at discretion; but good cause must be shewn by the appellant in his application to extend. *Smith v. Clark*, 1 Paige (N.Y.) 391; 2 Encyc. Pl. & Prac. 244.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J., IN CHAMBERS.

Ex Parte TREMBLAY.

Habeas corpus—Jurisdiction in province of Quebec—Judicial districts—Appeal side of the Court of King's Bench—Habeas Corpus Act, C.S.L.C. ch. 96—Crim. Code secs. 207 (f), 872 (b).

1. In the Province of Quebec, when there is a judge duly authorized then within the limits of the judicial district in which the applicant for a writ of habeas corpus is imprisoned on a criminal charge, a judge sitting in another district has no jurisdiction to entertain the application even on the consent of the Crown.
2. The court of King's Bench sitting in appeal either at Montreal or Quebec has jurisdiction to grant a writ of habeas corpus in respect of a prisoner confined in any district within the division for which the sittings are being held.

MONTREAL, October 9, 1902.

WÜRTELE, J.:—The petitioner, Louis Tremblay, was charged on the 4th day of July, 1902, before Husmer Lactot, Esquire, the district magistrate for the District of Iberville, under paragraph (f) of sec. 207 of the Criminal Code, with having on the 20th day of June, 1902, caused a disturbance in the streets of the town of Iberville while drunk, and on the day on which the information was laid he was convicted of the offence of which he was accused, and was thereupon sentenced to pay a fine of \$50, and, in the event of such sum not being forthwith paid, to be imprisoned in the common gaol of the district, at St. Johns, during six months, unless the fine should be sooner paid.

The petitioner did not pay the fine, and he was consequently conveyed to the common gaol in the town of St. Johns, and was confined in that prison, where he is still detained. He applied to the Hon. Mr. Justice Paradis, the resident Judge of the

Superior Court in the district of Iberville, for a writ of habeas corpus, alleging that his imprisonment was illegal, and asking to be released. His contention was that sec. 208, which prescribes the punishment of loose, idle and disorderly persons, does not provide any mode for enforcing the payment of the fines which may be adjudged, that under paragraph (b) of sub-sec. 1 of sec. 872, he could only be condemned to an imprisonment of three months in default of payment of the fine, and consequently that the conviction and commitment are illegal, and that he should be discharged from imprisonment and set at large.

He, however, withdrew his demand before Mr. Justice Paradis for a writ of habeas corpus, and he has now applied to me for a writ on the same grounds as were invoked before Mr. Justice Paradis.

Before I can consider the grounds on which he contends that his detention is illegal, I have to see if I have competent jurisdiction to entertain, hear and determine his application for the issue of a writ of habeas corpus.

By ch. 95 of the Consolidated Statutes of Lower Canada respecting the writ of habeas corpus for securing the liberty of the subject, all persons detained in prison for any criminal or supposed criminal offence have the right to demand from the Court of King's Bench, on its Crown or its appeal side, or from the Superior Court, or from any one of the Judges of either of such Courts, a writ of habeas corpus with all the benefit and relief which can result therefrom. Both Courts and the Judges belonging to either of them, have concurrent and equal jurisdiction in the matter. When the issue of a writ has been refused, the application cannot be renewed before the Judge who refused it, or before any other Judge, unless new facts are stated: but application may be made anew to the Court of King's Bench, on its appeal side, at Montreal or Quebec, according to the district where the appellant is confined is situated in the division for which the Court sits in one or the other of those cities. Although the jurisdiction of the Court of King's Bench, and of the

Superior Court, extends over the whole of the Province of Quebec, the first exercises its judicial functions in appeal either at Montreal or Quebec, and in criminal matters wherever it sits on its Crown side, and the other at its seat in each of the districts into which the province is divided; but in matters of habeas corpus they only have jurisdiction in the division or in the district where the applicant is confined. Then the general grant of jurisdiction in matters of habeas corpus which is conferred on the Judges of both Courts by the first section of the Act respecting the writ of habeas corpus is limited by sec. 27 of the Act by which any person deprived of his liberty must apply for a writ to any Judge who may be in the district in which he is confined, and who may be qualified and authorized to exercise his judicial functions there. In the event, however, of there being no Judge within the limits of such district, the application for a writ of habeas corpus may be made either to a Judge in any adjoining district, or to any Judge at the cities of Montreal or Quebec, according as appeals would be brought from the district where the applicant is confined; and in such cases sec. 27 provides that any proceedings so taken out of the limits of the district in which the applicant is confined, shall be as good and valid as if had and taken in such district. But as I have already stated, the Court of King's Bench on its appeal side has original jurisdiction in matters of habeas corpus with respect to any person confined in a district included in the one or the other of its two divisions.

To summarize, I may say that the Court of King's Bench, on its appeal side, has jurisdiction at Montreal or Quebec for districts from which appeals are brought to either one or the other of these cities; that the Court of King's Bench, on its appeal side, and the Superior Court, have jurisdiction in each district in which a person may be confined; that Judges of both Courts have jurisdiction with respect to persons confined in any district in which they may be present and may be authorized to exercise their judicial functions; and that when there is no Judge duly authorized within the limits of the district where

any person desirous of obtaining a writ of habeas corpus is confined, any Judge in an adjoining district, or any Judge at either Montreal or Quebec, according as the district in which he is so confined, belongs to the jurisdiction in appeal of the Court of King's Bench at the one or the other of those cities, has jurisdiction, but this provision does not bar the original jurisdiction of the Court of King's Bench at its sitting in appeal.

The Hon. Mr. Justice Paradis resides in the district of Iverville, where the prisoner is confined, and exercises his judicial functions there, and it has not been shewn to me, and established that there was no Judge within the limits of that district when the application for a writ of habeas corpus was made to me; I consequently have no jurisdiction in the matter, and I cannot grant any order for the issue of a writ of habeas corpus on the application. If the Court of King's Bench were now sitting in appeal, it would have original jurisdiction under the statute, and an application for a writ of habeas corpus could be made to it.

It was suggested, at the argument, that as no objection had been raised to my jurisdiction, and that as both the petitioner and the counsel acting on behalf of the Crown consented to the case being entertained by me, I had power and authority to take cognizance of the application, but in consequence of the rule that jurisdiction of the subject matter cannot be conferred by consent, the objection that a Court or a Judge is not given such jurisdiction by law cannot, of course, be waived by the parties.

The prisoner, therefore, can take nothing by his petition, which is rejected; and he is left to exercise such recourse for relief as the law may afford.

Habeas corpus refused.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE, RITCHIE AND TOWNSHEND,
JJ. AND GRAHAM, E.J.

THE QUEEN v. MCKAY.

Reserved case—Question reserved inapplicable to evidence—Quashing reserved case—Theft—Recent possession—Presumption—Rebuttal—Reasonable account of possession—Time of giving—Cr. Code secs. 314, 743.

1. Where the sole question referred to the appellate Court on a case reserved has no bearing on the facts proved in evidence, the case should be quashed.
2. Where a person charged with a theft has at the time of the finding of the goods in his possession given a reasonable account of the manner in which he became possessed of them, the presumption arising from his recent possession is rebutted, but semble, the same result does not of necessity follow from a like statement first made by the accused in his evidence given on his own behalf at the trial.

ARGUED: March 28, 1900.

DECIDED: March 28, 1900.

Defendant was tried before Johnston, County Court Judge at Halifax, under the Speedy Trials Act, charged with stealing a fur coat of the value of \$45.

On the conclusion of the case for the Crown defendant gave evidence on his own behalf to the effect that the coat in question was given him for sale by one Pace, who stated that it belonged to his sister, and who accompanied him to the shop of one Mrs. McDonald, to whom it was offered for sale.

The Crown did not call either Pace or Mrs. McDonald, although both were in Halifax at the time, and might have been called.

At the conclusion of the trial the prisoner's counsel moved for his discharge on the ground that it was incumbent upon the Crown to call the witnesses named to shew that the statement made by the prisoner was false.

This motion was refused on the ground that where the accused can give evidence on his own behalf, he has the status of any other defendant, and therefore the onus was on him to

support his allegations, and not on the Crown. The learned Judge found the prisoner guilty, but reserved the following question for the consideration of the Court:—

Where stolen property is found, as in this instance, on the accused, and he gives to those who find him, as in this case, a reasonable account of how he came by it, is it still incumbent on the prosecution, at the trial, to shew that that account is untrue, and should the Crown, in this case, have called Simon Pace and Mrs. McDonald?

HALIFAX, March 28, 1900.

J. T. Bulmer, for prisoner.—The prisoner having given a reasonable account of how he came in possession of the goods, it was incumbent on the Crown to prove that account to be false: *Regina v. Crowhurst* (1844), 1 C. & K. 370. (*RITCHIE, J.*—I don't think you have reserved that case. *WEATHERBE, J.*—It is not the account that the person gives at the trial which is referred to in the cases, but the account which he gives when he is found in possession of the goods). If a reasonable account is given at any time it rebuts the presumption of guilt arising from the fact of possession.

HALIFAX, March 28, 1900.

MCDONALD, C.J.:—There is no evidence here that any account was given by the prisoner at the time of his arrest to shew how the goods came into his possession.

WEATHERBE, J.:—I regret that prisoner's counsel did not appear to observe that he had no evidence whatever, upon which any of the law cited was applicable. Nobody has disputed the law. There seemed to be some misapprehension in his mind as to whether the statement to be made by a person accused of larceny is the account given at the time of his being found in the possession of the property, or some account given on a subsequent occasion.

If the prisoner, when found in possession of the goods, had made the statement which he made in Court, there would have been a question for the jury. If it was a reasonable account, the finding of the jury would be final. I do not say whether or not this was a reasonable account.

The learned Judge seems to have been under the same misapprehension.

RITCHIE, J.:—I do not think any evidence is returned upon which the question could be put.

TOWNSHEND, J., concurred with RITCHIE, J.

GRAHAM, E.J.:—The facts stated in the case do not enable the Court to determine the question reserved by the Judge of the County Court. It is not claimed that there were facts in evidence before the Judge, which enable it to be raised even if the case were amended. The case sent up ought to be quashed.

Note: Theft—Giving a reasonable account of possession.

In *R. v. Crowhurst* (1844), 1 C. & K. 370, the prisoner was indicted for larceny in stealing a piece of wood, the property of one Harman. It appeared from the evidence given on the part of the prosecution that on the piece of wood being found by a police constable in the prisoner's shop about five days after it was lost, he stated that he bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness.

Baron Alderson, in summing up, said :—

“In cases of this nature you should take it as a general principle that, where a man in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to shew that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is *primâ facie* a reasonable account, and I ought not to be convicted of felony unless it is shewn that that account is a false one.”

In a subsequent case of *R. v. Smith* (1845), 2 C. & K. 207, Lord Denman, C.J., sitting at the Oxford Assizes, said :—

Note—Continued.*Theft—Giving a reasonable account of possession.*

"I quite agree with the case of *Regina v. Crowhurst*, which is very correctly reported. It was mentioned to me by Baron Alderson at the time when it occurred. If a person in whose possession stolen property is found give a reasonable account of how he came by it, and refer to some known person as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person and put an end to the charge; and it also very often may be that the person thus referred to would become a very important witness for the prosecution by proving, in addition to the prisoner's possession of the stolen property, that he has been giving a false account of how he came by it."

In *R. v. Harmer* (1848), 2 Cox C.C. 487, the prisoner was indicted before Lord Chief Baron Pollock for having broken into a parish church and cut down and stolen certain black cloth with which the church had been temporarily draped. On the floor of the church was found a saddler's knife, and suspicion accordingly fell on the prisoner who was a saddler, living not far from the church. His house was searched and portions of cloth found which fitted and corresponded with the pieces still remaining in the church, and the knife was identified as the prisoner's by his apprentice. When the prisoner was first charged with the offence, he stated that he knew nothing of it, and that he had bought the cloth of a man named Lake, who lived about a mile off. This completed the case for the Crown, and the prisoner called no witnesses. The jury brought in a verdict of guilty.

Pollock, C.B., in summing up said :—

"Counsel for the prisoner had appealed to the court to direct an acquittal on the ground that he had given the name of the party from whom he had obtained the cloth, and that party was not called by the prosecution to disprove that statement, as he might have been. But that application had been refused, because the discovery of the prisoner's knife in the church went to shew that he himself was the thief; and therefore the account he had so given was either not true or not likely to be so. The prisoner was, therefore, properly left to reconcile the finding of his knife with his innocence, by shewing from Lake that he had come honestly by the cloth, notwithstanding that fact; the rule on this matter being that the prosecutor was not bound to call persons named by the prisoner unless his account was evidently true or there was good reason to believe it to be true, till contradicted. Here there was no such reason, as the facts were at variance with the story; but still the story might be true, and it was for the prisoner to make out its truth by calling the man from whom he had bought the stolen property."

Where, on a charge of receiving, it was proved that the prisoner had told the constable who found the stolen property in his possession, that he had purchased it from a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held to be unnecessary to

Note—Continued.

Theft—Giving a reasonable account of possession.

Call the tradesman if the jury could fairly infer from the other circumstances of the case that the prisoner's statement was false. *R. v. Ritson* (1884), 15 Cox C.C. 478 (Grove, Hawkins, Stephen, W. Williams and Matthew, JJ.). It is a question in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner. *Ibid.*

Recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances of the case. So, where goods have been stolen from a dwelling house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, *together with* proof that they were actually stolen, would amount not to a violent, but to a probable presumption merely. Archbold's *Crim. Pleading* (1900), 312. But if the property were not found recently after the loss, as for instance not until sixteen months after, it would be but a light or rash presumption and entitled to no weight. *Anon* (1826), 2 C. & P. 459; *R. v. Adams* (1829), 3 C. & P. 600; *R. v. Cooper* (1852), 3 C. & K. 318.

Sec. 716 of the Criminal Code provides that when proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

THE KING v. SING.

Summary conviction—Two similar charges on different informations tried consecutively—Reserving judgment on first until evidence heard on second—Dismissal of first and conviction on second charge—Certiorari—Affidavit of magistrate to prove that evidence in each case separately considered—Illegal sale of liquor—Indian Act—Cr. Code sec. 845, 850.

1. Where a magistrate trying two charges against the same defendant for similar offences, reserved judgment in the first case until after the trial of the second, and then dismissed the first charge and convicted on the second, such conviction will not be set aside on certiorari if it is shewn that the magistrate was governed in each case solely by the evidence therein given.
2. Semble, evidence would not be admissible to shew what operated on a judge's mind with reference to the conduct of the trial, had such proceedings taken place at a "Speedy trial" before a County Court judge.

The Queen v. McBerny (1897) 3 Can. Cr. Cas. 339 (N.S.) distinguished.

DECIDED: March 24, 1902.

APPLICATION for certiorari to quash a conviction by which the applicant, who was charged with selling liquor to an Indian, was convicted and fined \$50.00 by a justice of the peace. The facts appear in the judgment.

Harold Robertson, for the applicant.

Maclean, D. A.-G., contra.

VICTORIA, B.C., March 24, 1902.

DRAKE, J.: A rule nisi in this case was granted on the ground that the magistrate before whom the accused was charged with selling liquor to Indians, heard two informations for similar offences, one committed on the 1st of January, 1902, and the other on the 20th of January, in the same year, and reserved his judgment until the second case was concluded. He then dismissed the first information and convicted on the second.

Mr. Robertson, for the defendant, contended that such a course of procedure was contrary to the principles and spirit of the criminal law, which is that each case should stand on its own merits, and should be decided on the evidence given in relation to that particular charge; and the first case that he cited was that of *Hamilton v. Walker*, [1892] 2 Q.B. 25, 56 J.P. 583, in which the defendant was charged with delivering to one Farrell, a number of indecent advertisements, to the intent that they should be delivered to certain inhabitants, etc.; secondly, that the defendant aided, counselled, and procured Farrell to exhibit to certain inhabitants certain indecent advertisements. The magistrates heard the first summons, and said they would hear the other before rendering judgment, and convicted on both charges. Pollock and Williams held both convictions bad. Pollock, because each case should be considered on its own merits, and Williams, because it prevented the defendant from pleading autrefois convict to the second charge in case he was convicted on the first. This case was considered in *Reg. v. Fry et al* (1898), 19 Cox C.C. 135, which is very like the present one. Three informations were laid against a beer house keeper for breaches of the Licensing Act, which happened on different days. Mr. Justice Fry was the chairman of the Bench of Magistrates who heard the case. They proceeded to hear all three cases before giving their decision, and eventually convicted on the first case, and dismissed the other two. A rule for a certiorari was granted to quash the conviction. The arguments in favour of making the rule absolute were much the same as those put forward here, that the hearing of subsequent summonses was likely to influence their judgment, and it was in fact mixing up two matters of complaint. The Court held that the Justices had answered the objections in their affidavit, and that they had treated the evidence as applicable only to the summons to which it related, and if the postponement was merely to decide the amount of the penalty, there was nothing wrong in their proceedings; and they distinguish the case of *Hamilton v. Walker*, *supra*, pointing out that the conviction

was quashed because there was nothing to shew that the evidence there had been confined to the particular case, and Pollock, on whose judgment the plaintiff lays great weight, says, "I do not go so far as to say that the Justices might not reserve their judgment after hearing the evidence (upon the first case)." There is an affidavit in the case before me that satisfies me that the magistrate was governed only by the evidence applicable to the case on which he convicted.

In the case of *The Queen v. McBerny* (1897), 3 Can. Cr. Cas. 339, decided by a full Bench of the Province of Nova Scotia, it was held that where the defendant was tried before the County Court Judge's Criminal Court on four distinct charges of theft, no judgment being pronounced until all the cases had been heard, the convictions were invalid on the grounds that the prisoner must be tried only on the evidence given in relation to the particular charge on which he has been indicted, and that when a prisoner is indicted, and on his trial, that trial must be proceeded with and finished before he can be tried on any other indictment. There was no evidence that the County Court Judge confined the evidence to the particular charge, in fact the contrary appears to have been the case. Townshend, J., refers to the argument which was addressed to the Court, that inasmuch as the Judge rightly admitted evidence of the other charges to shew the animus of the accused, there would be no objection to his reserving his decision until all the evidence was heard; but he did not agree with it.

I think that a distinction can be drawn between trial of an indictment and a hearing before a Justice. Under the Code a trial before the County Court Judge is in all respects governed by the same principles as a trial at the assizes, and evidence is not admissible to shew what operated on the Judge's mind with reference to the conduct of the trial.

In cases before a magistrate evidence is admissible before the Superior Court which is applied to for a writ of certiorari as to what actually occurred and what governed the Magistrate's conduct. I think that a magistrate should not mix up two

criminal charges, as there must be separate informations for each offence. He should therefore dispose of them as they arise. If the defendant had been convicted on the first case, his position would have been stronger, as he might suppose that the magistrate had been influenced by what he heard in the second case; but here the first case was dismissed, and the second case therefore could not be influenced by circumstances arising at a previous date, and not proved. The magistrate has made an affidavit stating that each case was solely governed by the evidence adduced in support of it, the same as was done in *The Queen v. Fry, supra*, and the fact that the first case was dismissed strengthens the affidavit of the magistrate. I, therefore, refuse the rule, but without costs.

Certiorari refused.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.C.P.,
AND MACMAHON, J.

THE KING v. JAMES.

Merchandise marks—Apples fraudulently packed—Having in possession for sale—Mens rea—"Faced surface," meaning of—Fruit Marks Act (Can.) 1 Edw. VII. ch. 27.

1. It is an offence against the Fruit Marks Act to have in possession for purposes of sale apples packed so that more than 15 per cent. of the contents of the barrel is substantially inferior in grade to the faced surface, although the sale actually made was to a purchaser who inspected the bulk and consequently was not defrauded.
2. It is not essential to the offence that there should be a fraudulent intent on the part of the accused.
3. *Semble*, the offence is complete although the accused neither knew of the fraudulent packing nor was negligently ignorant of it.

ARGUED: May 8, 1902.

DECIDED: July 18, 1902.

Motion to quash a conviction made by the police magistrate of the city of Toronto on the 17th day of February, 1902.

The conviction was that Eben James "did, in the month of February, 1902, at the city of Toronto, sell, and have in his possession for sale, apples packed in eighteen packages, in which the faced or shewn surface gave a false representation of the contents of the said packages, contrary to sec. 7 of the Fruit Marks Act (Can.) 1 Edw. VII., ch. 27" and was fined \$4.50, the minimum fine for a first offence, *i.e.*, twenty-five cents per barrel.

By section 7 "no person shall sell, or offer, expose or have in his possession for sale, any fruit packed in any package in which the faced or shewn surface gives a false representation of the contents of such package; and it shall be considered a false representation when more than fifteen per cent. of such fruit is substantially smaller in size than, or inferior in grade to, or different in variety from, the faced or shewn surface of such package."

At the trial before the police magistrate it appeared that the defendant, a large fruit exporter doing business at the city of Toronto, had stored in a cold storage warehouse eighteen barrels of apples. The Government inspector saw ten of these barrels, the apples in which at the branded end thereof were of a superior quality to those in the other parts of the barrels, but it was admitted that these barrels were not intended for sale.

The other eight barrels had been exposed for sale and actually sold, and had been sent out of the defendant's warehouse, but, before being sold, the contents had been tipped out and shewn to the purchaser. The condition of these apples shewed that their faced or shewn surface was of a superior quality to the inner contents, and on being repacked after being so shewn were restored to their original condition.

TORONTO, May 8, 1902.

J. D. Montgomery, for the motion. It is only necessary to deal with the eight barrels, for it is admitted that the ten barrels were not intended for sale. Then, as to the eight

barrels, there is no evidence of a false representation. The purchaser knew of the contents of the barrels. They were tipped up and shewn to him, and he knew exactly what he was buying. The "faced or shewn surface" means the branded end. If this is not so, then the Act is too indefinite to justify a conviction.

R. B. Beaumont, contra. There is clearly an offence within the meaning of the section. The mere having in possession for sale constitutes an offence. Here the apples were not only exposed for sale, but were actually sold. It is not necessary that a fraud should be intended and the purchaser imposed on. Then, as to the "faced or shewn surface:" this is not limited to the branded end. It refers to any shewn surface of the package. If this were not so, the purchaser could easily be defrauded. In order to do so, it would only be necessary to brand the top of the barrel, and then shew the bottom, which had been fraudulently packed, to the purchaser; or the brand could be changed from one end of the barrel to the other, according as a vendor dealt with a purchaser or Government inspector.

TORONTO, July 18, 1902.

MEREDITH, C.J.:—The conviction is in respect of eighteen packages of apples, and it is for selling and having in possession for sale the apples packed in these packages in which the faced or shewn surface gave a false representation of the contents of the packages.

Ten of the packages were, according to the admissions of the parties, in storage, and not intended for sale, and were not, in fact, sold, and as to them the conviction cannot be supported.

There must be to constitute an offence against the section either a selling, or offering, or exposing, or having in possession for sale and there was neither.

The other eight packages were exposed for sale and actually sold. An offence against the section was complete

though no sale nor offer to sell had taken place. The having them in possession for sale is an offence against the section. This being so it is immaterial that when sold the purchaser was not imposed upon, because, as the fact was, the whole contents were tipped out of the packages for his inspection and he saw the quality of the bulk.

The Legislature, for the purpose of protecting the public against the frauds which the Act is designed to prevent, has chosen to make the law so stringent that the mere having in possession packages of fruit fraudulently packed, when the having in possession is for the purpose of sale, is an offence and we have no warrant for refusing to give effect to the law it has made, because in the particular case no one was imposed upon, and no fraud was intended by the person charged with the offence.

I do not understand that it is questioned that eight packages were fraudulently packed within the meaning of the section. The third admission which is designed to raise the question as to what is the "faced or shewn surface" of a package appears to apply only to the ten packages as to which we have found that no offence is shewn to have been committed. As at present advised I do not see why the branded end of the package is the only place where a "faced or shewn surface" may be found, or why if the bottom of the barrel is faced with fruit of a better quality than the bulk that is not enough to bring the case within the section. As pointed out by Mr. Beaumont, if it were otherwise the provisions of the section might be easily evaded, and purchasers imposed upon by the bottom of the barrel being opened and the fraudulently packed surface exhibited to the purchaser.

The conviction must be amended by confining it to the eight packages, and the offence to having them in possession for sale, and the fine will be reduced to \$2.00.

There will be no costs to either party.

It would be well, I think, if the Act were amended by defining the meaning of the terms of "the faced or shewn

surface," and possibly also by relieving from the penalty one who has in possession for sale packages fraudulently packed, if he is able to shew that he did not know of the fraudulent packing and was not negligently ignorant of it.

MACMAHON, J., concurred.

Conviction amended.

[COURT OF KING'S BENCH, QUEBEC.]

CROWN SIDE.

DISTRICT OF MONTREAL.

BEFORE THE HONORABLE MR. JUSTICE HALL.

ANONYMOUS CASE (H— v. H—).

*Vagrancy—Non-support of wife—"Wilfully refusing or neglecting to maintain"
—Reasonable ground for believing that liability had terminated—Wife
living in adultery pending her action for separation—Cr. Code sec. 207 (b).*

1. To constitute a wilful refusal or neglect by a husband to maintain his wife (Cr. Code sec. 207), there must be an absence of any reasonable ground for believing the refusal or neglect to be lawful.
2. A husband who has been ordered by a civil Court in an action brought by his wife for separation to pay to his wife an interim alimentary allowance is relieved from that liability in the province of Quebec on proof that the wife is supporting herself by immorality, and a criminal prosecution against him for non-support will be dismissed on the like proof.

DECIDED: December 13, 1902.

This is an appeal from a conviction before the Police Magistrate upon a complaint by a wife against her husband for refusal to contribute to her support, under Article 207, sub-section (b) of the Criminal Code.

MONTREAL, December 13, 1902.

HALL, J.:—It appears that the wife first took an action against her husband in the civil courts for separation from bed and board. In connection with that action she applied for and obtained leave from the Court to reside, pending the action, at a designated house in V. Street in this city. She also applied for an interim alimentary allowance of \$100 per month. By an interlocutory judgment the Court ordered the husband to pay to his wife the sum of \$30 on the 7th of each month. These payments are proved to have been regularly made until the month of August

last. In the meantime the wife, without the permission of the Court, and in violation of Art. 203 of our Civil Code, removed from V. Street to a house in U. Street, and after a few weeks residence there, again removed in May last to a furnished house in Sherbrooke Street. The husband unaware of any reason to object to these changes continued the monthly payments, as before stated, until August last, when he received information which led him to believe that his wife was living in the Sherbrooke Street residence as the kept mistress of a married man, separated from his wife, and who it was discovered had been a boarder at the U. Street house during Mrs. H's residence there, and a frequent visitor upon her at the house in V. Street. The husband thereupon discontinued further payments on account of his wife's alimentary allowance. She took an execution for the unpaid August instalment and seized some of her husband's property. He opposed the seizure upon the ground that his wife, by her adultery, had forfeited any claim against him for support. That opposition is still pending. Upon the September instalment falling due and remaining unpaid, the wife made the present complaint, alleging that her husband was liable to fine and imprisonment under Art. 207 of the Criminal Code for that (using the words of the Article) "being able to work and thereby or by other means to maintain himself and family" (consisting of herself), he had wilfully neglected and refused to do so for the last two months.

The husband contested the arrest upon the same ground as he had contested the seizure—that is, his wife's adultery and her forfeiture thereby of any claims against him for support. He brought forward such evidence as he could then furnish as to his wife's infidelity, but it was vague and did not satisfy the trial magistrate that the defendant's suspicions were well founded.

The magistrate had no alternative therefore, inasmuch as the husband admitted his ability to pay and his refusal to do so, but to convict him of the charge of non-support during the months of August and September. From that conviction the husband entered an appeal to this Court, and under our procedure which virtually makes of such an appeal, a new trial, he has furnished

evidence, which it is unnecessary to review, but which leaves no doubt in my mind that the husband was thoroughly justified in his suspicions.

I have therefore to decide whether the belief thus entertained by the appellant, based on the evidence which he has adduced in support of it, should relieve him from the sentence pronounced against him.

The liability of a husband to contribute towards his wife's support, pending an action for separation, is, in this Province, entirely a civil obligation, and is provided for by our Civil Code. It is based upon the wife's *wants*, and her *lack of means of subsistence* (Articles 202 and 213).

I am aware that the jurisprudence of our Civil Courts has maintained the principle that evidence of previous adultery on the part of a wife would not relieve the husband, even after separation from bed and board, from his liability to contribute toward her support in proportion to her wants and his means. The reason is obvious. It is a matter of public interest that the wife against whom no present act of immorality is alleged, should not be compelled, by want, to relapse into her former state, and the original obligation of the husband for her support at the time of his marriage is therefore revived and enforced to that extent, and for that purpose, but I am unaware of any decision that has gone so far as to hold that a husband could be compelled to contribute money to a wife who was actually supporting herself at the time, or procuring her support, by immorality. She could not invoke the condition of *want* upon which that obligation is imposed.

Independently of this, is the different principle under which civil and criminal laws are interpreted and enforced, for it must not be overlooked that although a text of criminal law has been adopted to aid in enforcing the provisions of the civil law in regard to the support of a family, it is by the spirit and rules been incidentally adopted to aid in enforcing the provisions of the civil law in regard to the support of a family, it is by the spirit and rules of the criminal law that we must be guided in giving effect to this article in the case actually before us.

It is significant that although there are no less than twelve sub-divisions of offences under the general article as to "vagrants,"—many of them of a very serious character, such as keeping and frequenting brothels, gaming, etc., the one we have now under consideration in regard to neglect to support a family is the only one of the twelve in which the word "wilfully" is used to qualify the act or the omission punishable under the statute. It is therefore not the act itself which furnishes the test as to the application of the law as in the other eleven sub-divisions of the article, but the spirit, the intent, the justification or lack of justification in which the act was performed. "When used in a penal statute" (says The American and English Encyclopedia of Law, vol. 8, p. 282, note), "the word 'wilful' means much more than it does in common parlance. It means with evil intent, or legal malice, or *without reasonable ground for believing the act to be lawful*."

When, under the circumstances above mentioned the defendant refused to furnish money for his wife, whom he believed to be kept at that time by another man as his mistress, can he be said to have refused such payments "without reasonable ground for believing his act to be lawful"? I cannot bring myself to accept that view. I think it would be against public policy, an outrage upon public decency and morals. A husband would have a right, in my opinion, to consider that under such circumstances he was relieved of any previous obligation resting upon him in that respect, and I would feel bound to hold, and to instruct a jury to hold, that if the accused had reasonable grounds for his belief, he should be acquitted of a charge like the one brought against the present appellant.

As under my appreciation of the evidence in the present case, I think the accused had reasonable grounds for his belief, I maintain the appeal with costs and dismiss the complaint. Persons who choose to live such lives as those exposed to us in this trial should not resort to the criminal law for assistance. Its provisions were not intended for their protection.

Appeal allowed and conviction set aside.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS AND
LISTER, JJ.A.

ATTORNEY-GENERAL v. SCULLY.

Court of General Sessions—Records—Custody of by clerk of the peace—Public documents—Inspection—Right of accused to demand certified record of acquittal—Fiat of Attorney-General unnecessary—Mandamus—Action for malicious prosecution—Evidence—46 Edw. III.—Crim. Code 654, 726.

1. The judgments of the Courts of General Sessions in Ontario are public records, and any person interested therein is entitled, as of right, to inspect them, and to obtain an exemplification of the record.
2. A person tried and acquitted in any criminal court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to compel the delivery of certified copies or an exemplification thereof upon tender of the proper fees.
3. The English statute, 46 Edw. III., as to the publicity of Court records is in force in Ontario.

R. v. Scully, 5 Can. Cr. Cas. 1, affirmed.

ARGUED: November 19, 1901.

DECIDED: June 28, 1902.

Appeal by the Attorney-General of the Province of Ontario from the judgment of a Divisional Court in the matter of *Rex v. Scully*, reported 5 Can. Cr. Cas. 1.

One Cornelius Scully was indicted at the general sessions of the peace at Stratford for stealing forty-one logs and was acquitted. He then applied to the clerk of the peace for the county of Perth for a certified copy of the indictment and indorsements, but not having the fiat of the Attorney-General, his application was refused.

A motion was then made on his behalf before Falconbridge, C.J.K.B., in Chambers, for a prerogative writ of mandamus to the clerk of the peace, which motion was dismissed.

He then appealed to the Divisional Court, who reversed the decision of Falconbridge, C.J., and ordered the writ to issue.

TORONTO, November 19, 1901.

John R. Cartwright, K.C., Deputy Attorney-General, and *Frank Ford*, for the appeal. The Court below, relying on *Her-*

bert v. Ashburner (1750), 1 Wils. 297; *The King v. The Sheriff of Chester* (1819), 1 Chit. R. 476, and *The King v. The Justices of Staffordshire* (1837), 6 A. & E. 84, has decided that any one interested has a right to see the records, etc., in the hands of the clerk of the peace. We do not dispute that, but those cases go no further. In *The King v. The Sheriff of Chester* it was a mere question of inspection, and in *Herbert v. Ashburner* a mere question of property. The judgment appealed from also refers to Mr. Graves' note in 3 Russell on Crimes, 4th ed., 350, but passes over the text, which says that "a copy of the indictment cannot be regularly obtained without an order from the Court": p. 349. There is no distinction between cases at the assizes and at the sessions, but the position of the clerk (of the peace) at the sessions is the stronger one, as he is an independent officer appointed by the Crown, and the Crown in this Province is the *custos rotulorum*. No record of acquittal can be obtained or even made up without the fiat of the Attorney-General: *Regina v. Ivy* (1874), 24 C.P. 78; *Hewitt v. Cane* (1894), 26 O.R. 133; *Groenvelt v. Burrell* (1697), 1 Ld. Raym. 252; *Morrison v. Kelly* (1761), 1 Wm. Bl. 385; and 46 Edw. III., which was much discussed in *Preston's case* (1691), 12 How. St. Trials 646, at p. 660, was not overlooked in those cases. Any case shewing a contrary conclusion was where it was desired to prove *autrefois acquit* or *convict*. It is the duty of an officer not to produce without authority: *Legatt v. Tollervey* (1811), 14 East 302, 12 Rev. Rep. 518, *per* Lord Ellenborough; *Jordan v. Lewis* (1740), there cited and referred to, p. 520; *ib.*, 2 Stra. 1122; Taylor on Evidence, 8th ed., sec. 1490. The *semble* in the headnote in *Browne v. Cumming* (1829), 5 Man. & Ry. 118, is not supported by the judgment. *The King v. Brangan* (1742), 1 Leach C.C. 27, stands by itself. *The King v. Hewes* (1835), 3 A. & E. 725, was a mere application to change a verdict to conform with a jury's finding. We also refer to 1 Tidd's Practice, 8th ed., 647; 3 Lewis' Bl. Com. 126; *Gray v. Pentland* (1815), 2 Sergt. & R. (Penn.) 22, at p. 34; *Kelly v. Pickett* (1807), 2 Brevard (S. Car.) 144; C.S.U.C. ch. 110.

Arnoldi, K.C., and *A. M. Panton*, contra. *Regina v. Ivey* and *Hewitt v. Cane* were mere obiter dicta. The position of a prisoner is different from that of an acquitted person. 46 Edw. III. came into force in Canada with the Quebec Act of 1792, and is in force now, and under that statute the right of the respondent to a copy of the indictment is undoubted. The Old Bailey order was passed merely to alter a previous practice, and did not apply to any other Court, and being contrary to 46 Edw. III., was illegal and void. After the prisoner's acquittal his civil right arises to have a copy of the indictments, etc., and the Crown cannot interfere with that right. A *custos rotulorum* in England was appointed by the King to keep the records of the quarter sessions, and was a magistrate, who appointed a clerk as his deputy. Here the clerk of the peace is not a clerk to a magistrate, but holds the records in his custody, as a provincial officer, in the interest of the public and not of the Crown. Even if the Attorney-General is in control of the custody of records of criminal trials at the assizes, he is not in similar control of the records of the general sessions of the peace. The indictments of the general sessions are public documents: *Herbert v. Ashburner*, 1 Wils. 297; *The King v. The Sheriff of Chester*, 1 Chit. R. 476. The respondent is entitled to have the record made up and to get a copy of it: *The King v. The Justices of Middlesex, In re Bowman* (1834), 5 B. & Ad. 1113; *The King v. Brangan*, 1 Leach C.C. 27; *The King v. Hewes*, 3 A. & E. 725, at p. 732. There is no precedent for the right claimed by the Attorney-General. So far as the Crown formerly used its power arbitrarily, the refusing proof of a record was only an instance of the oppression arising therefrom. No such use of such power has been made within the present memory of Crown officers in England. No proof of the record is now required there: a certificate of the custodian is sufficient: 8 & 9 Vict. ch. 113 (Imp.). We refer also to *Caddy v. Barlow* (1827), 1 Man. & Ry. 275, at p. 279 (note); Roscoe's Dig. of Crim. Evidence, 11th ed., 180; Taylor on Evidence, 9th ed., p.

1488; *Müller v. Lea* (1898), 2 Can. Cr. Cas. 282, 25 A.R. 428; Statutes at Large, vol. 10, p. 43 (1786 appendix).

Cartwright, in reply.

TORONTO, June 28, 1902.

ARMOUR, C.J.O. (dissenting):—I am unable to agree with the judgment appealed from, and think that it should be reversed.

The question is as to the right of the Crown to refuse to permit its officers to draw up a record of acquittal of a person charged upon an indictment for felony, to be used in an action for malicious prosecution.

It has been said that such right is founded upon the order made by the Judges, sitting in the sessions in the Old Bailey for London and Middlesex, in 16 Car. 2, "That no copies of any indictment for felony be given without special order upon motion made in open Court, at the general gaol delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictment) deterreth people from prosecuting for the King upon just occasions."

It seems to have been sometimes supposed that this order applied only to indictments at the Old Bailey, but although made by the Judges sitting at the sessions in the Old Bailey, it was of general application.

In *Groenvelt v. Burrell*, 1 Ld. Raym. 252, the Court said: "But a man cannot have a copy of a record of a conviction of treason or felony without the leave of the Attorney-General": p. 253. And Holt, L.C.J., said: "If A. be indicted of felony, and acquitted, and has a mind to bring an action, the Judge will not permit him to have a copy of the record, if there was probable cause of the indictment, and he cannot have a copy without leave": p. 253.

In *The King v. Brangan*, 1 Leach C.C. 27, "At the Old Bailey September session 1742 Patrick Brangan and another were tried for a highway robbery and acquitted. The prosecu-

tion appeared to have been brought merely for the purposes of vexation and oppression; and the prisoners' counsel applied to that Court for a copy of the indictment.

"Lord Chief Justice Willes, who tried the prisoners, acknowledged that the prosecution bore the strongest marks of being unfounded and malicious, but refused the application, because it was not necessary that *he* should grant it; declaring, that by the laws of this realm every prisoner, upon his acquittal, had an undoubted right and title to *a copy of the record of such acquittal*, for any use they might think fit to make of it; and that after a demand of it had been made, the proper officer might be punished for refusing to make it out."

In a note to this case it is said: "The Court will not grant a copy of the indictment when the acquittal arises from the incompetency of a witness: *Quick's* case, January session, 1784, and see *Beran's* case, January session, 1786."

In *Morrison v. Kelly*, 1 Wm. Bl. 384, "At the sittings in Middlesex after Term, this action came on to be tried, being for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for the Westminster sessions attended with the original record of the acquittal.

"*Norton*, Solicitor-General, objected, that there ought to be a copy of the record granted by the Court, before which the acquittal is had, in order to ground an action for a malicious prosecution. But it was ruled by Lord Mansfield that though this is necessary, where the party is indicted for felony, yet the practice is otherwise in case of misdemeanors."

In *Jordan v. Lewis*, 2 Str. 1122, better reported in a note to *Legatt v. Tollervey*, 14 East 302, at p. 305; 12 Rev. Rep. 518: "The plaintiff and one Stebbing were indicted at the Old Bailey for forging a promissory note, and acquitted; and the Court ordered Stebbing only to have a copy of his indictment; but *Jordan*, having also procured a copy of the indictment and acquittal, brought an action against the defendant for a malicious

prosecution; and this copy was produced in evidence, etc. It was objected that the copy ought not to be received, because the Judge had refused to grant Jordan a copy of the indictment; and the order that had been made for that purpose at the Old Bailey was produced. But Lee, C.J., who tried the cause, allowed this copy to be given in evidence; and the prosecution appearing to be malicious, the plaintiff recovered £200 damages; but the Chief Justice gave the defendant leave to move for a new trial; which he did but the Court said: This being a copy of the indictment, the Court could not refuse receiving it in evidence; nor could the Court take notice in what manner it was obtained. It was likewise held that to procure a copy, etc., . . . could not be considered as a contempt (by the plaintiff) of the Court; and therefore the motion was denied. But the Chief Justice said that if the defendant had applied sooner, when this action was first brought, the Court would have stayed proceedings. And Chapple, J., said that the defendant might have an action against the officer for giving the plaintiff a copy of the record; for he ought not to have drawn up the copy, etc., that was granted to Stebbing, as if both defendants had been acquitted; but that only Stebbing, who had a copy, etc., allowed him, was acquitted. And he said he had known that done, *Sed tamen quaere*; for the record is entire." In Mr. Justice Clive's note of the same case, it is said to have been "doubted by the Court, whether the defendant could not maintain an action on the case against the officer who had granted a copy of the indictment contrary to the orders of the Court": p. 306. However that might be, it seems that such conduct in an officer would be a high contempt of the Court, and punishable accordingly.

In *Legatt v. Tollervey*, 14 East 302, 12 Rev. Rep. 578, the action was for malicious prosecution of the plaintiff by the defendant for felony; and at the trial before Heath, J., it was stated by the plaintiff's counsel in opening his case, that a bill of indictment for a felony had been preferred by the defendant against the plaintiff at the quarter sessions of the peace for the

County of Sussex, on which the plaintiff was tried and acquitted; and then another bill was preferred for the same offence, which the grand jury did not find; and the plaintiff afterwards called an officer of that Court as a witness, who produced the indictments; but as it did not appear that either the court of quarter sessions or the Attorney-General had authorized a copy of either of the indictments to be given to the plaintiff, the learned Judge would not suffer either to be proved, and nonsuited the plaintiff; relying on a case of *Evans v. Phillips* at Monmouth summer assizes 1763, in which Mr. Baron Adams declared that he should look on the copy of an indictment as surreptitiously taken, and not to be regarded, unless the Court had been applied to and had ordered such copy.

On the argument of the rule for a new trial, Le Blanc, J., observed "that if the officer of the court of quarter sessions had applied to the Judge at nisi prius, and stated that he was ready to produce the records, but had no order of the Court to do so, there is no doubt that the Judge would have told him that he was not bound to produce them on the mere application of the party. But it is a different question whether, if offered to be produced in evidence, such evidence was properly rejected for want of an order."

Lord Ellenborough, C.J., in delivering the judgment of the Court, said: "It is very clear that it is the duty of the officer, charged with the custody of the records of the Court, not to produce a record but upon competent authority, which at the Old Bailey is obtained upon application to the Court, pursuant to the order which has long prevailed there; and with respect to the general records of the realm, upon application to the Attorney-General. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and he may be warned at the time of his peril in so doing: and a discreet officer placed in

such a situation would, doubtless, before he produced the record, or gave a copy of it, apply to the Court, and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such disclosure, the Court should order him to do. But still I cannot help thinking, that the rule laid down by Lord Chief Justice Lee in the case of *Jordon v. Lewis* is the correct one."

The order made at the Old Bailey does not state that actions against prosecutors cannot be maintained without an order first obtained for a copy of the indictment, but only that they cannot be maintained without copies: pp.306, 307, and 308.

Caddy v. Barlow, 1 Man. & Ry. 275, is to the same effect.

In *Browne v. Cumming*, 10 B. & C. 70, "A rule had been obtained by the Attorney-General to restrain the plaintiff from using, in this cause, a copy of an indictment alleged to have been improperly obtained. It appeared by the affidavits, that in December, 1825, a commission of bankruptcy was issued against the plaintiff, under which he was declared to be a bankrupt, and the defendant Cumming was appointed an assignee. In 1827, Cumming and the other defendants prosecuted the plaintiff for an alleged concealment and embezzlement of his effects, and at the Somerset summer assizes, 1827, he was tried and acquitted before Burrough, J. Browne's counsel thereupon applied for a copy of the indictment, but the learned Judge refused to order that it should be granted. Some communication was afterwards made by the learned Judge to Browne's counsel, which the latter considered as a promise to grant the order upon a fresh application; and accordingly an application was made, when the learned Judge stated that he had considered the matter, and found that he had not any authority to make such an order, except upon motion in open Court at the assizes, and that the Attorney-General alone had power to do it. An application was then made to him; and upon its being stated that Burrough, J., had promised to grant the order, and would have done so had he been authorized to do it,

the Attorney-General gave his fiat for the granting a copy; which was done accordingly, and an action commenced against the defendants for a malicious prosecution. The Attorney-General having been afterwards informed by the learned Judge that he had not promised to grant the order, this rule was obtained."

Lord Tenterden, C.J., delivering the judgment of the Court, said: "Taking all the facts of this case into consideration, we do not think that there has been a mistake or misrepresentation of such a nature as to call upon the Court to interfere:" p. 73.

It is said that the Judges who made the order at the sessions in the Old Bailey in 16 Car. 2, had no jurisdiction to make such an order, and that it was illegal, as being contrary to the statute, 46 Edw. III., in these words: "Also the Commons pray, that whereas records, and whatsoever is in the King's Court ought of reason to remain there, for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need; and yet of late they refuse, in the Court of our said Lord to make search or exemplification of any thing which can fall in evidence against the King or in his disadvantage. May it please (you) to ordain by statute, that search and exemplification be made for all persons, . . . of whatever record touches them in any manner, as well as that which falls against the King as all other persons. *Le Roy le voet*."

It cannot be supposed that the Judges who made this order were ignorant of this statute, or that they acted without jurisdiction in making it, having regard to the construction of the statute which then prevailed, and it is hard to believe that if this order was made without jurisdiction and was illegal, that it should have been recognized as binding for so many years by so many Courts and Judges without any objections being made to it by any one except Chief Justice Willes.

It has been said that Denman, C.J., in *The King v. The Justices of Middlesex, In re Bowman*, 5 B. & Ad. 1113, intimated an opinion in accordance with that expressed by Chief Justice

Willes; and that Patterson, J., intimated a like opinion in *The King v. Hewes*, 3 A. & E. at p. 732, but an examination of these cases will shew this to be erroneous.

The Court from the earliest times has directed the drawing up of records of conviction and acquittal to enable prisoners charged upon indictments to plead autrefois convict or autrefois acquit.

And in *Rex v. Bowman* the prisoner was tried, convicted and sentenced at a sessions which had lapsed, and being brought up at a subsequent sessions for trial, and being desirous of pleading autrefois convict, and not being prepared with a record of the conviction, his trial was adjourned to the next sessions to enable it to be obtained: *Rex v. Bowman* (1833), 6 C. & P. 101.

The prisoner then moved for a mandamus to compel the justices to draw up a record of the conviction, and to this it was objected that the conviction was a nullity; but Denman, C.J., said: "The prisoner has a right to have the record of the proceedings which passed at sessions correctly made up, and to make any use of it that he can," obviously meaning for his defence to the pending indictment against him: *The King v. The Justices of Middlesex, In re Bowman*, 5 B. & Ad. 1113; *Rex v. Bowman* (1834), 6 C. & P. 337.

In *The King v. Hewes*, 3 A. & E. 725, the application was for a mandamus to the justices commanding them to correct the alteration made by the clerk of the peace in the minute of the verdict given by the jury, or to alter the minutes of the verdict so given according to the fact. The prisoner was indicted for poisoning mares, by mixing poison with their food. The jury returned a verdict of "guilty by mischance," which the clerk of the peace entered in his minute book. The defendant's counsel submitted that the verdict was a special one, and amounted in law to an acquittal. After some observation by the counsel for the Crown, the chairman told the jury, that they must find the defendant either guilty or not guilty,

and requested them to reconsider their verdict. They retired, and afterwards brought in a verdict of guilty, but recommended no mercy; and, being asked the ground of their recommendation, said that he did not do it with malicious intent but to benefit the condition of the horses. The Court refused the application, and Patterson, J., said in the course of his judgment: "So, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a mandamus, as in *The King v. The Justices of Middlesex*.

Considering the length of time this order has been in force, and the great weight of authority by which it has been supported and recognized as binding, I do not feel warranted in holding it to have been made without jurisdiction, and to be contrary to the statute 46 Edw. III.

Nor do I feel warranted in holding, that the rule laid down by the Court of which Holt was Chief Justice, that "a man cannot have a copy of a record of a conviction of treason or felony without leave of the Attorney-General," and recognized ever since, is no longer binding because I am unable to trace and ascertain its origin.

I do not know what construction was put upon the statute 46 Edw. III. by the Judges, who had to construe it in those days; but I do know that before I could come to a conclusion, that it applied to proceedings against persons charged with treason or felony, I should have to hear the question argued, and at present it appears to me, that it did not apply to such proceedings until, at all events, they became records by the entry of final judgment.

This statute was referred to in the case already cited of *Groenvelt v. Burrell*, and has been insisted upon time and again by persons charged upon indictments of treason and felony, as entitling them to copies of the indictments, but always without success.

In the case of Edward Fitzharris, indicted for high treason, reported in 8 Howell's State Trials, page 225, this at page 259 takes place: "Mr. Wallop" (of counsel for the prisoner), "My Lord Coke, in his preface to the third Report, declares, that it was the ancient law of England, and so declared by Act of Parliament in Edward 3rd's time, that any subject may, for his necessary use, have access to records and copies of them, be they for the King or against the King; and that the practice to the contrary is an abusion."

"L.C.J. (Sir Francis Pemberton), 'So then, Mr. Wallop, you take it that we are bound when any man is indicted of felony or treason, or any capital crime, if he say he must have a copy of the Record, we must grant him a copy of the indictment: if you think so, the Court and you are not of the same opinion:'" *Sir Richard Grahme's case*, 12 Howell 646.

In England the statute 7 Will. III., ch. 3, first gave a person charged with high treason or misprision thereof a right to a copy of the indictment, but in felonies to this day, the prisoner is not entitled to a copy of the indictment, and not even if he requires it in order to prepare a plea to it of autrefois acquit, but the Court will direct the clerk of arraigns to read the indictment over to him slowly and distinctly: *The King v. Vandercomb* (1796), 2 Leach C.C. 708.

And the Imperial statute, 6 & 7 Will. IV., ch. 114, sec. 4, first gave persons under trial a right to inspect at the trial the depositions taken against them.

And in this Province, the Act 4 & 5 Vict. ch. 24, first gave the right to persons under trial to obtain copies of the depositions taken against them, and to inspect them at the trial.

And in this Province, the Act 6 Will. IV., ch. 48, first gave to a person, charged upon an indictment for felony, a right to a copy of the indictment; but it was therein provided that such copy should not be received in evidence upon any trial for a malicious prosecution: this proviso clearly indicating the intention of the Legislature, to preserve the control of the Court and of the Crown over the proceedings in cases of felony.

This proviso remained in force till Confederation, and it was argued by counsel for the Crown that it was still in force in this Province; but this is a question which it is not necessary for me to determine in this case.

The rule that a person acquitted of felony shall not have a copy of the record of acquittal, for the purpose of being used in an action for malicious prosecution, without an order of the Court or the consent of the Attorney-General, has always been in force in this Province, and was maintained in *Regina v. Ivy*, 24 U.C.C.P. 78, and in *Hewitt v. Cane*, 26 O.R. 133, and I do not think that it should now be abrogated by judicial decision, but that it should be left to the Legislature to do so if it sees fit. The necessity for the rule is, at present at least, as great as it ever was, and if abrogated, some other safeguard against unfounded actions for malicious prosecution ought to be substituted for it.

The judgment appealed from, if affirmed, will overrule the decisions of *Regina v. Ivy* and *Hewitt v. Cane*, the cases not being distinguishable; for if the record of acquittal cannot be obtained without the consent of the Attorney-General, it can make no difference what officer of the Crown has the custody of the proceedings, and it cannot be said that the clerk of the peace is not such an officer.

In fine, my opinion is that the Crown, acting through the Attorney-General, has the right to refuse to permit its officers to draw up a record of acquittal of a person, charged upon an indictment for felony, to be used in an action for malicious prosecution, and that this appeal should be allowed with costs here and below.

OSLER, J.A.:—I agree in the reasoning and conclusion of the learned Chancellor's judgment, and would think it unnecessary to add anything, were it not that the point has long been considered a debatable one, notwithstanding some decisions of our Courts which are in effect overruled by our present judgment.

It is, in my opinion, the right of a person who has been acquitted of an offence to have the judgment in his favour duly entered up by the proper officer, upon application made to him for that purpose; and to obtain an exemplification of such judgment if necessary for the purpose of proving his acquittal.

It is conceded, that the practice—always doubted—by which such right has been denied, rests upon the celebrated Old Bailey order of King Charles the Second's time, 16 Car. 2, 1664-5. It is one of the several "Orders and directions to be observed by justices of the peace and others, at the sessions in the Old Bailey at London and Middlesex:" Kelyng's Reports, preface. These were made by two of the chiefs of the common law courts and three other Judges. Their jurisdiction to make this particular order is not now discoverable. So far as we can judge from its terms, it owed its origin solely to the circumstances of the time, and was an attempt on the part of its framers to provide a remedy for what was then deemed to be a prevalent abuse, viz., "the late frequency of actions against prosecutors:" par. 6.

In *Lusty v. Magrath*, E.T. 5 Vict., 6 U.C.O.S. 340, Robinson, C.J., says: "The point does not seem to be quite satisfactorily settled:" p. 341.

From the well-known work, Stephens' *Nisi Prius*, vol. 3, pp. 2287-8, I cite the following: "'In *Groenvelt v. Burrell*, 1 Ld. Raym. 253 (M.T. 1697), Chief Justice Holt stated: if A. be indicted for felony and acquitted, and he has a mind to bring an action, the Judge will not permit him to have a copy of the record if there was probably cause of the indictment; and he cannot have a copy without leave.' Chief Justice Holt was also present at the trial of Lord Preston (12 Howell 659-663), but there he does not deny that a party acquitted of felony has a right to a copy of an indictment for the purpose of using it in evidence, although he refused it to a person about to take his trial for the offence charged in the indictment. In cases of misdemeanour it has been considered, that a party acquitted is entitled to a copy of the record: *Morrison v. Kelly*, 1 Wm. Bl.

385. So also of cases of summary convictions: *Rex v. Midlam*, 3 Burr. 1720. The distinction between such cases and those of indictments for felony seems to rest entirely on the order of the Judges made at the Old Bailey, as reported by Kelyng." The author adds in a note, p. 2287: "It is very questionable, whether the Judges did not exceed their authority when they made this order; their power is to administer the law, not to alter it;" and see note to *Browne v. Cumming*, 10 B. & C. 70.

It is said that the order was republished at the Old Bailey sessions of May, 1739 (see reporter's note to *The King v. Brangan*, 1 Leach C.C. 27), but in that case Lord Chief Justice Willes refused upon application, to make an order that the acquitted prisoner should have a copy of the record, saying, that it was not necessary that he should do so, "that by the laws of this realm every prisoner upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for any use they might think fit to make of it; and that after a demand of it had been made, the proper officer might be punished for refusing to make it out." See also the argument of counsel for plaintiff, and the authorities cited in *Browne v. Cumming*, 10 B. & C. 70; *S.C.* 5 Man. & Ry. 118; 8 L.J. (O.S.) K.B. 89, in support of the contention that the Old Bailey order was at variance with the law as stated by Lord Coke in the preface to the third part of his Reports, where he says that "The records of the King's Courts, for that they contain great and hidden treasure, are faithfully and well kept, as they well deserve, in the King's treasury; and yet not so kept but that any subject may, for his necessary use and benefit, have access thereunto, which was the ancient law of England, and so is declared by an Act of Parliament, 46 Edw. III." These are, no doubt, the "laws of this realm" alluded to by Willes, C.J., and by the text writer I have quoted.

And see *Caddy v. Barlow*, 1 Man. & Ry. 275, note (a), pp. 279, 280, where the statute is quoted and translated: "Also the Commons pray, that, etc. . . . May it please (you) to ordain by statute, that search and exemplification be made for

all persons, . . . of whatever record touches them in any manner, as well as that which falls against the King as other persons. *Le Roy le voet.*"

Taylor on Evidence, 1897, secs. 1488: "The inspection and exemplification of the *Records of the Queen's Courts*, when they are required for the purpose of *being given in evidence*, have been admitted, from a very early period, to belong to the public of *common right*." See also secs. 1489, 1490, where the Old Bailey order is criticized and its authority denied. See also the 3rd edition of the same work (1858), sec. 1341; and Phillips on Evidence, 1839, 5th American from 8th London ed., pp. 802-3, to the same effect.

In *The King v. The Justices of Middlesex, In re Bowman*, 5 B. & Ad. 1113, a prisoner, indicted for felony, desired to have the record of proceedings against him therefor at a former session made up and a copy granted to him, for the purpose of pleading *autrefois* convict. Denman, C.J., said: "The prisoner has the right to have the record of the proceedings which passed at sessions correctly made up, and to make any use of it he can."

As the editor of Russell on Crimes, vol. 3, p. 428, 5th ed., pointedly observes, if the prisoner is entitled as of right to a copy of the proceedings for the purpose it was there required for, "it is difficult to see why he should not have the same right for the purpose of instituting a civil suit to seek reparation for the injury which he has sustained by the malicious conduct of the prosecutor."

It cannot escape observation that the Old Bailey order makes no allusion to the fiat of the Attorney-General, which is what is now insisted upon as the essential thing, relying upon a dictum of Lord Holt in the case above cited of *Groenvelt v. Burrell*, which is, however, not noticed in the report of the same case, sub nom. *Greenvell v. Censor of the College of Physicians*, in 12 Mod. 145. It simply forbids a copy of the indictment from being given out "without special order upon motion made in open Court at the general gaol delivery." Such an order would

have been unnecessary, if the right of the party to a copy of the record depended upon the fiat of the Attorney-General, and it can hardly be supposed that Judges would have made the order or assumed a jurisdiction which belonged to that officer, had he in fact possessed it.

It is foreign to the general principles of our law, that the right of one subject to pursue a civil remedy against another shall depend upon the permission of an official of the Crown, of however exalted a character; for if he may refuse to allow him to procure the evidence, without which his action cannot be successfully prosecuted, he does, in effect, refuse to allow him to maintain the action at all. A practice, moreover, which concedes the right to a copy of the record of acquittal on an indictment for a misdemeanour, but denies it except by permission of the Attorney-General in the case of an indictment for a felony, is anomalous and wanting in principle. Other anomalies in the practice are noticeable in some of the decisions, as, for example, that if the exemplification of the record happens to have been procured without an order, or even by inadvertence or misapprehension on the part of the Judge in granting the order, the party cannot be prevented from using it: *Browne v. Cummings*, 10 B. & C. 70; *Lusty v. Magrath*, 6 U.C. O.S. 340; and if one of two persons, jointly tried and acquitted, has obtained a fiat therefor, it having been refused to the other, the latter may make use of the record thus obtained in his own action: *Caddy v. Barlow*, 1 Man. & Ry. 275.

The distinction between indictments for felonies and misdemeanours, as regards the necessity for a fiat of the Attorney-General or Judge's order, was altogether an arbitrary one. Proceedings in both cases were in the King's Court, and these names being now abolished, and crimes described generally as offences, nothing remains to which the distinction can apply or make it necessary that a fiat should be applied for. I have no doubt that the officer of the Court has no authority to produce at the trial of a civil action the original record of criminal proceedings against the party, without the authority of the Court or Judge, or perhaps of the Attorney-General; although if he does so the evidence can-

not be rejected: *Leggatt v. Tollervey*, 14 East 302, 12 Rev. Rep. 518. But I do not see how this proposition conflicts with the right of the party to obtain an exemplification for the purpose of evidence, as neither the custody nor the preservation of the original is endangered or affected thereby.

In *Richardson v. Willis* (1872), L.R. 8 Exch. 69, it was held that the 13th section of 14-15 Vict. ch. 99 (Imp.), which allows a criminal record to be proved by a certificate of the officer having custody of the record, omitting the formal parts, applies to proof in civil as well as criminal proceedings. There is no suggestion in the case, that the right to obtain such certified copy depends upon the fiat of the Attorney-General or order of the Court. The Act merely substitutes a simpler proof for the more expensive one of an exemplification.

Upon the whole it appears to me that the authority for the Old Bailey order not being now discoverable, we ought not to assume or invent one for it, or to treat it as applicable to proceedings in our Courts. The jurisdiction of the Judges to make it has been criticised and denied by eminent Judges and text-writers; and it appears to be directly in conflict with what, if one were now passing upon it for the first time, one would say with Lord Coke is the plain meaning of the statute 46 Edw. III., and the rights which that statute confers upon the subject.

Since the foregoing was written, the learned Attorney-General has informed the Court, that he has communicated with the law officers of the Crown in England, as to the state of the practice there on the subject. He appears to have the authority of the present and former Attorney-General for saying that the practice which was supposed to be established here by *Regina v. Ivey*, 24 U.C.C.P. 78, and which is now insisted on by the appellant, is quite obsolete in England. That the Attorney-General's fiat is not deemed necessary, and that no obstacle whatever is placed in the plaintiff's way of obtaining the evidence of the termination of the proceedings against him. The practice of the Attorney-General holding, as it were, an enquiry as to the existence or absence of reasonable and probable cause is unheard of.

No technical objections were taken to the form of the application, or the sufficiency of the material on which it was launched. The question was argued on the merits, and I am of the opinion that the appeal should be dismissed.

Moss, J.A.:—The question presented for decision upon this appeal is whether a subject who has been prosecuted for a criminal offence which prior to the Criminal Code was classed as felony, and acquitted, is obliged to procure the fiat of the Attorney-General as a condition to obtaining an exemplification or copy of the record to be used in an action for malicious prosecution as evidence of the favourable termination of the criminal proceeding.

The Divisional Court, reversing Falconbridge, C.J., has held, in favour of the subject, that he is entitled as of right to an exemplification or copy, upon payment or tender to the proper officer having custody of the record or the materials from which it may be made up in the form prescribed by section 726 of the Criminal Code, of the fee or charges to which he is entitled.

Upon the appeal to this Court it was strongly urged that it was firmly settled in this Province that, once the Court at which a criminal trial had been held is over, no record of acquittal can be obtained or even made up without the fiat of the Attorney-General.

It was conceded, however, that the rule contended for was confined to cases of felony and had no application to cases of misdemeanour.

The existence of the right of a subject to a copy or exemplification of the record in a case of misdemeanour has long been recognized by Judges and text-writers. But the reason why, in a case of felony, a different rule should prevail, does not manifestly appear. It seems to rest upon the Old Bailey order of 1641.

As shewn upon its face, this order was made by some of the Judges for the regulation of the Old Bailey sessions, and was promulgated with other matters directed "to be observed by the jus-

tices of the peace and others at the sessions of the Old Bailey." The frequency of actions against prosecutors "which cannot be without copies of the indictment" was alleged as the reason for ordering that no copies of any indictment for felony be given without special order, upon motion made in open Court at the general gaol delivery.

This order imposed a new restriction upon what appears to have been theretofore recognized as the general right of any subject, viz., access to the judicial records of the King's Courts for his necessary use and benefit, "which was the ancient law of England, and is so declared by an Act of Parliament in the forty-sixth year of Edward III.:" Phillips on Evidence, p. 802, referring to 3 Inst. 71, where is to be found Sir Edward Coke's declaration, "And albeit the cause adjudged be particular, yet when it is entered of record, it is of great authority in law, and serves for perpetual evidence, and therefore ought to be common to all, yea, though it be against the King: as it is declared by Act of Parliament in Anno 46 E. III., which you may reade in the preface to the third book of my reports."

The practice of the Old Bailey seems to have spread to others of the Courts, but, nevertheless, the jurisdiction of the Judges to make the order was questioned on several occasions.

But even this order and the practice which grew upon it, only curtailed the right of the subject, while the indictment and papers were in the keeping of the Court during the session. It did not sanction any restriction upon inspection and right to copies or exemplification, when they had become judicial records by deposit with the appropriate official for safe keeping.

The necessity for a fiat from the Attorney-General in order to entitle a person to these privileges in a case of felony was recognized by some, but denied by others of the Judges of England. Even where the existence of the rule was acknowledged, the Courts were not indisposed to countenance a departure from it, as in *Jordan v. Lewis*, 2 Stra. 1122, 12 Rev. Rep. 520 (n); *Legatt v. Tollervey*, 14 East 302, 12 Rev. Rep. 518; and *Browne v. Cumming*, 10 B. & C. 70.

In England the practice of requiring the fiat seems to have gradually died out, and apparently had fallen almost, if not wholly, into desuetude before 1851, in which year was passed the Imperial Act, 14 & 15 Vict. ch. 99.

The provisions of section 13 seem entirely at variance with the notion that a fiat from the Attorney-General was necessary. They seem almost to assume that no more is required than an application to the custodian of the record for a certificate in the terms of the Act. And, as I understand it, that is all that is now done in practice. At all events, we now know that for a considerable period, no such practice as that of requiring a fiat has prevailed in England, and that, if for any reason, an application is made for a fiat where a certified copy of the record of the indictment, trial, conviction and judgment, or acquittal in a case of felony is sought, the fiat is granted as a matter of course, even though the avowed object of procuring the copy is to make use of it in an action for malicious prosecution.

In *Regina v. Ivy*, 24 U.C.C.P. 78, the point whether a person tried for felony and acquitted could only obtain a copy of the indictment and of acquittal to be used in an action for malicious prosecution on the fiat of the Attorney-General was raised, but was not actually determined, the decision turning upon the point of jurisdiction to entertain the motion. But Hagarty, C.J., inclined to the opinion that the fiat was necessary; and Gwynne, J., expressed himself strongly in favour of that view. Galt, J., as far as appears, expressed no opinion. Gwynne, J., proceeded upon what he understood to be the universal practice prevailing in England, and relied upon the ancient cases. But in England these cases are now treated as obsolete, and in 1874, when *Regina v. Ivy* was decided, the practice under the Imperial Act, 14 & 15 Vict. ch. 99, sec. 13, had prevailed in England for twenty-three years, and in all likelihood was then the same, or nearly the same, as it is to-day.

In *Hewitt v. Cane*, 26 O.R. 133, the late Mr. Justice Rose, after a very full reference to the conflicting cases, thought it safe to follow the practice which had obtained for many years, and the

opinions of Judges of our own Courts of co-ordinate jurisdiction. And he was inclined to the opinion, which, from his point of view, would seem the logical conclusion, that the rule applied as well to cases of misdemeanour as of felony after the indictments had been returned to the registrar of the Queen's Bench Division, who, I think, was at that date acting as clerk of the Crown and Pleas.

Meredith, C.J., while yielding to the authorities and concurring in the result of the judgment, expressed his own view to be opposed to the practice. MacMahon, J., agreed with Rose, J., except on one point.

Reading the cases, English and Canadian, touching the question, I do not find that any fixed rule has been settled by judicial authority. In the present state of the authorities, I think we are at liberty in this Court to place our own construction upon the 46 Edw. III., which is undoubtedly in force in this Province, and to say whether the exercise of the rights, thereby conferred, are subject to the restriction sought to be placed upon them, where a record of acquittal in a case of felony is sought for the purpose of being used as evidence in an action for malicious prosecution. In view of the many opinions which have been expressed, I venture mine with diffidence. On the whole, my conclusion is in favour of upholding the judgment appealed from.

I am not able to place upon the comprehensive language of the 46 Edw. III. the restricted meaning which has been contended for. It appears to me to apply to all judicial records, as well criminal as civil, and to give the subject access to them for his necessary use and benefit, which was, and is, the law of England. To my mind the declaration of Willes, C.J., in *The King v. Branagan*, 1 Leach C.C. 27, that by the laws of the realm every prisoner upon his acquittal had an undoubted right to a copy of the record of such acquittal, is a plain declaration of the meaning of the ancient statute.

I venture to think that the practice of requiring a fiat is not in accord with the true spirit and meaning of the law, as declared in the statute; is not even supported by the Old Bailey order,

which, as before pointed out, did not extend the restriction beyond the time when the Court was actually in session, and is not adapted to modern conditions.

The law gives a right of action for malicious prosecution, and if it is desirable to place restrictions upon the general right of a person, who has been acquitted of a criminal charge, to maintain such an action, the Legislature can so declare. In it resides the power to provide safeguards against frivolous or vexatious actions, if any safeguards are deemed necessary.

Possibly if the trial of such actions were committed to Judges alone, no further safeguard would be required.

I would affirm the order appealed from.

MACLENNAN, J.A., concurred with OSLER and MOSS, J.J.A.

LISTER, J.A., died while the case was sub judice.

Appeal dismissed.

Note: Certifying record of acquittal for use in action for malicious prosecution.

The decision in *The King v. Scully* (1901), 5 Can. Cr. Cas. 1, which was under review on this appeal *sub. nom. Attorney-General v. Scully*, related to the records of a court of general sessions in Ontario in the custody of the clerk of the peace under statutory authority. That fact raised a possible point of distinction between such an officer and a deputy clerk of the Crown as to the right to grant a mandamus for the delivery of an exemplification of the record. The former Ontario cases had established a practice in that province of applying to the Attorney-General as the superior Crown officer of the province to direct by his fiat the making up of a certificate of the proceedings by the clerk of the Crown as a subordinate Crown Officer. *Regina v. Ivey* (1874), 24 U.C.C.P. 78; *O'Hara v. Dougherty*, 25 Ont. R. 347. And in *Hewitt v. Cane* (1894), 26 Ont. R. 133, it was said that after the return of indictments disposed of at assize courts to the clerk of the Crown and Pleas at Toronto, they are held by him as a Crown officer apart from his duties as an officer of the High Court of Justice.

Boyd, C., in his judgment in the Court below in *R. v. Scully*, said:

"The present case is distinguishable from the points involved in *R. v. Ivey*, 24 U.C.C.P. 78, and *Hewitt v. Cane*, 26 Ont. R. 133, because the indictment and minutes of acquittal are in the hands of the clerk of the peace, the trial being at the sessions and not at the assizes." (5 Can. Cr. Cas. at p. 4.)

Note—Continued.

Certifying record of acquittal for use in action for malicious prosecution.

And while, by that judgment, the public right to procure a copy of the record in any court is declared, the right of the Court to grant a prerogative writ of mandamus to the clerk of the peace is therein based principally upon considerations which would not apply to a similar application against a Crown officer whose official actions were under the direct control of the Attorney-General.

The Court of Appeal have, by the above judgment, declared against the practice of requiring a fiat from the Attorney-General, but their decision, *supra*, does not declare a right to mandamus officers other than clerks of the peace, and quære would a mandamus lie against the Attorney-General or the clerk of the Crown and Pleas in respect of a record of indictment returned to the latter after the trial and acquittal of the accused?

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., AND BOSSE, BLANCHET,
HALL AND WURTELE, JJ.

EX PARTE FORTIER.

*Bail—Habeas corpus—Felony or misdemeanor before the Criminal Code 1892—
Distinction affecting right to bail—Probability of appearance for trial if
bailed—Evidence on preliminary evidence—Serious doubt as to guilt—Cr.
Code, secs. 423, 602.*

1. A person committed for trial in respect of an indictable offence which was a felony before the Criminal Code 1892 is not entitled as of right to bail and it is discretionary with the superior Court exercising habeas corpus jurisdiction to allow or refuse bail in such cases.
2. In determining whether or not bail should be granted, the probability of the party appearing for trial in case he is bailed is the principal consideration, and the question of guilt may properly be considered in determining the degree of such probability.
3. Where the evidence upon which the committal was made raises a serious doubt as to the guilt of the accused, or if it stands indifferent whether the accused is guilty or innocent, an application for bail should be granted.
4. With respect to indictable offences which were misdemeanors before the Criminal Code 1892, the accused committed for trial is entitled to bail as a matter of right on habeas corpus.

MONTREAL, November 24, 1902.

The judgment of the Court was delivered by

WURTELE, J.:—On the 27th October, 1902, Honoré Giroux, a detective in the employ of the Government of the Dominion of Canada, laid two informations, at Ste Scholastique in the District of Terrebonne, before District Magistrate Husmer Lanctot, against Vincent Fortier, the petitioner, one charging him with having forged, on the 4th April, 1899, an application in the name of one Charles Miller to the Postmaster-General for the withdrawal of \$100 from the Post Office Savings Bank Branch of the Post Office Department, in part repayment of the deposit made by the above mentioned Charles Miller, and the other charging him with the theft, while being an employee of the Government of the Dominion in the Post Office at Ste Scholastique, of various

sums of money taken by him from the 20th April, 1899, to the 6th March, 1901, and amounting in the aggregate to the sum of \$4,400, and being part of the deposits made in the Post Office Savings Bank and as such the property of His Majesty the King.

The petitioner was arrested, and after a preliminary inquiry he was committed for trial on both charges on the 14th November, 1902, by the District Magistrate. After having been committed he applied for bail to the Honorable Mr. Justice Taschereau, the Judge charged with the administration of justice in the district of Terrebonne, under the provisions of sec. 602 of the Criminal Code, but on the 17th November, 1902, the Judge refused to admit him to bail.

He then applied to this Court for a writ of *habeas corpus* for the purpose of being admitted to bail, and the writ was granted under the original jurisdiction conferred upon the Court in matters of *habeas corpus* by sec. 1 of ch. 96 of the Consolidated Statutes of Lower Canada, which has never been repealed. The Hon. the Attorney-General of the Province was notified both in writing and orally by the petitioner's counsel of the application which was to be made for bail, but he neither appeared nor delegated any counsel to appear on his behalf.

The application for bail was made by the petitioner's counsel, Mr. Ethier, and Mr. Leduc appeared for the private prosecutor, who is acting on behalf of the Post Office Department and in reality for the Government of Canada, but, while not explicitly acquiescing in the application, not really objecting to it.

Bail means the release of a person from custody upon the undertaking of two or more persons for him and also upon his own recognizance, that he shall appear to answer the charge made against him at the place and time appointed. It is a delivery or bailment of a person to his sureties, so that he is placed in their friendly custody instead of remaining in prison.

All Superior Courts of criminal jurisdiction or one of their judges, and also in this Province a Judge of the Superior Court, have authority and power to admit persons accused of any crime whatsoever (including treason and capital offences), to bail, but,

as respects indictable offences which were felonies before the enacting of the Criminal Code it is within their discretion to allow or to refuse the application for bail; while with respect to indictable offences which were formerly misdemeanours it must be allowed, as the accused is entitled to it as a matter of right. In all cases except misdemeanours, the granting or refusing bail is a matter which rests in the sound discretion of the Court or Judge, and is not as of right.

The propriety of admitting to bail for indictable offences which were formerly classified as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing to take his trial, which is the object of bail, and not with reference to the supposed guilt or innocence of the party. In determining whether or not to admit an accused person to bail the principal thing to be considered is therefore the probability of his appearing for trial, and to determine this question it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, his means and his standing. Where a serious doubt exists as to the guilt of the accused, and he is entitled to the benefit of every reasonable doubt, his application for bail should be granted. Then, again, if on the evidence it stands indifferent whether the accused is guilty or innocent the rule generally is to admit him to bail; but if, on the contrary, his guilt is beyond dispute, the general rule is not to grant the application for bail, unless the opportunities to escape do not appear to be possible and the probability of his appearing for trial is consequently considerable, if not sure.

In the present case, while on the one hand the evidence presented against the petitioner at the preliminary inquiry is of a serious nature, although open to dispute, and the punishment of the offences with which he is charged is heavy, on the other hand his opportunities for escape, if he should be bailed, are inconsiderable and next to impossible, as he is well known, and would be under the supervision of his sureties and of the police, and he therefore could not leave his home without being traced and fol-

lowed, and he could be rendered to prison by his sureties before the day appointed for his appearance if they should have reason to suspect his intention to fly from the country, and after such day, in case of default he could be arrested under a bench warrant anywhere in Canada, and could be extradited from elsewhere, and the probability of his appearing for trial is considerable if not next to certain. Then the petitioner is a notary, and he can only practise and gain his livelihood as such in this province, and to do so he would have to live and act in the public view, while in any other province or in the neighbouring republic he would be without any resource except from his labour as a clerk or a journeyman, a most unalluring prospect.

Without taking into consideration the supposed guilt or innocence of the petitioner, under the circumstances of the case the Court is, therefore, of opinion that he should be let to bail.

But there is another reason for granting the application for bail. The Attorney-General, who is entrusted with the administration of justice in the Province, and who has been notified both in writing and orally of the application for bail, has neither appeared personally nor delegated counsel to appear on his behalf, and he has consequently not opposed the application. Then the counsel for the private prosecutor, who is acting on behalf of the Post Office Department, or of the Government of Canada, has not urged any grounds in opposition to the application for bail. Now these circumstances can only arise from the fact that both the Attorney-General and the private prosecutor are not unfavorable to the petitioner being admitted to bail.

The Court is of opinion that it should be ordered, and it is therefore ordered, that upon the petitioner giving security before the District Magistrate, Husmer Lanctot, at the Court House at Ste Scholastique, in the district of Terrebonne, to whom power to that effect is delegated by his (the petitioner's) own recognizance in the sum of \$10,000 with two sufficient sureties in the sum of \$5,000 each, who shall justify as to their sufficiency, or five sufficient sureties in the sum of \$2,000 each who must likewise justify, for the personal appearance of the petitioner at the next term of

the Court of King's Bench, on its Crown side, to be holden in and for the district of Terrebonne, then and there to answer to the charges of forgery and of theft for which he was committed for trial in the district of Terrebonne on the 14th November, 1902, and for which he is now confined in the common gaol, and that he do not depart that Court without leave, he, the petitioner, shall be discharged out of the custody of the keeper of the common gaol in and for the district of Terrebonne as to his commitments for the above mentioned offences, and that upon such recognizance by the petitioner and his sureties being entered into, to the satisfaction of the district magistrate, he, to that end, do order that the petitioner be released from the custody of the keeper of such common gaol, if detained for no other cause.

Bail granted.

Ethier, for the petitioner.

Leduc, for the private prosecutor.

No one for the Attorney-General.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, J., GRAHAM, E.J., AND
MEAGHER, J.

THE KING v. BRINDLEY.

Evidence—Corroboration—Allowing girl under 18 to be on premises for immoral purposes—Crim. Code, secs. 187, 684.

1. On a charge of allowing a girl under 18 to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there carried on, is sufficiently corroborated under Code sec. 684, by the evidence of another witness tending to shew that the place was a bawdy house.

ARGUED: February 6, 1903.

DECIDED: February 6, 1903.

CROWN case reserved for the Supreme Court in Banc sitting as a Court of Appeal for Crown cases reserved, by Graham, E.J., pursuant to section 743 of the Criminal Code, as follows:—

Ada Brindley, the defendant, was indicted and convicted on October 11th, 1902, under the Criminal Code, section 187, for inducing or knowingly suffering, in May last, Annie Walters, a girl under the age of 18 years, to be upon her premises, 176 Albermarle Street, for the purposes of being unlawfully and carnally known by men.

Annie Walters stated in her evidence that she was on her way home to her boarding house about 11 o'clock, p.m., and, going by the premises in question, a girl—an occupant, Cassie or Jessie Williams, standing outside—asked her to go in, and she did so. There were present there other girls besides the defendant, Cassie Williams and Sarah and Laura Carter, and two men. They were all colored except Annie Walters. They were playing the piano and dancing around. One man was playing the piano, and one was singing when she went in. This was in a small sitting-room. Back of it was a barroom and a kitchen, and there was a bedroom on that flat, and more than one up-stairs. The defendant asked Annie if she had a place. She said she was boarding

at a place, but they were going to give it up. After staying about an hour, Annie Walters proceeded to get ready to go home. The defendant asked her if she could get in, and she said it was rather late. The defendant told her she could stay all night, and she did so. The next day the defendant made an arrangement with Annie Walters that she was to pay \$2 per week for her board and one-half of the money that she got from men, and she was to occupy the bedroom down stairs. She remained on the premises about five days. Men would come into the barroom and be talking with the defendant, and *she* would point them to Annie Walters. She had during the five days eight or nine men assigned to her; had connection with them in this bedroom, and paid over to the defendant one-half of what she received. The defendant asked how old she was. She said she would be 18 in November coming, and the defendant told her to say that she was twenty.

The defendant cross-examined her to shew that she had before this been an inmate of a house of ill-fame, probably to attack her credibility, and it was established, I think, to the satisfaction of the jury that she had been.

The father of Annie Walters satisfactorily proved that her age was under 18.

The testimony of Sarah Carter, an unwilling witness for the Crown, was as follows:—

"I live on Albermarle Street, 88, I live by myself. I am acquainted with Mrs. Brindley. I have lived in the same house with Mrs. Brindley on the corner of Buckingham and Albermarle. I lived there in the month of May last. I lived on the Albermarle (street) side. She lived on the front of Albermarle. My apartments were separate from hers, on the front of the street, up-stairs. My room was by itself. Mrs. Brindley had rooms up-stairs. I only had one; she had two. I paid 60 cents a week. Same hall for all the rooms; used the hall door. Some days she would have to go to the hall door. Sometimes I used to be in Mrs. Brindley's—that's where the piano was. The piano was in the front room. Back of this was the shop where she sold

beer. The kitchen was in back; one bedroom there. I saw Annie Walters in the month of May. She came there on Friday night and left on a Wednesday. I was there when she came. She stayed there all night. She slept in the back room, off the kitchen. Mrs. Brindley was there when she came in. The back room was her room while she was there. She slept in the bed. I went out a little while after she came in. I could not tell what time of night it was. I was not home all the time. I saw her when she went down stairs. I generally saw her in the kitchen. Sometimes in the piano room. Sometimes men would come in and get a drink and walk out again. I never saw her talking to any men. There was a man playing the piano and one man singing when she came in. I was not dancing. I was there when she left. Laura lived in a room by herself in the same house. Mrs. Brindley was not home when she left."

(Cross-examined) :—"Mrs. Brindley lived with her husband. I had rooms and Laura had rooms. She (Mrs. Brindley) has a little boy. No liquor sold; temperance drinks. Mrs. Brindley keeps no girls. I never had any conversation with Annie Walters except once. I asked her for a spoon. She said she was two months in the family way."

Another colored woman, Mary Ellen Williams, a cousin of the defendant, who apparently slept there, said "that Annie Walters came there for a night's lodging. She came there on a Friday night and remained there until Thursday."

The defendant did not go into the witness box.

Inasmuch as there were circumstances in Sarah Carter's testimony, as I thought, tending to shew that this was a house of prostitution, and as defendant by cross-examination shewed that Annie Walters was a prostitute, I thought the jury might infer from evidence other than that of Annie Walters that the defendant knowingly suffered her to be upon the premises for the purpose of prostitution.

The question for the opinion of the Court is: Whether under section 684 of the Code, Annie Walters was corroborated in some material particular by evidence implicating the accused in induc-

ing or knowingly suffering Annie Walters to be upon her premises for the purpose of being unlawfully and carnally known by men generally. If she was not, the conviction will be quashed. Otherwise, it will stand.

HALIFAX, February 6, 1903.

Dr. Russell, K.C., John J. Power with him, for the prisoner: There is nothing in the corroborative evidence to lead to the inference that this was a house of prostitution.

As to what constitutes corroboration; the evidence of corroboration must be such that if it were possible to convict on the evidence of one witness alone, it would be proper to convict on that evidence alone. Chamberlayne's Best on Evidence, 8th ed. s. 609; *Regina v. Boulter*, 2 Den. C.C. 401; *Regina v. Giles* (1856), 6 U.C.C.P. 84; *The Queen v. Vahey*, 2 Can. Cr. Cas. 258; *Champeny's Case*, 2 Lewin 258; *The Queen v. Yates*, 1 C. & M. 132; Roscoe's Criminal Evidence, 12th ed. p. 115.

[GRAHAM, E.J., referred to *Cole v. Manning* (1877), 2 Q.B.D. 611, as decisive of this point].

A. Cluney, for the Crown, contra: Sarah Carter's evidence corroborates the principal witness circumstantially.

There are statements in the evidence of Sarah Carter from which the jury could reasonably infer that the evidence of the principal witness was true, and it is proved that this was a house of prostitution and that Annie Walters was a prostitute.

There are statements in the evidence of Sarah Carter sufficient to raise the inference that Annie Walters was there for an improper purpose. *The Queen v. Shaw*, 34 L.J.M.C. 169.

Russell, K.C., in reply, referred to *Regina v. McBride*, 26 O.R. 639. In *Cole v. Manning*, 2 Q.B.D. 611, there were the corroborative elements of impropriety and the imbecility of the girl.

HALIFAX, February 6, 1903.

THE COURT unanimously held that the evidence of Annie Walters was sufficiently corroborated as required by section 684 of the Code, and affirmed the conviction.

Conviction affirmed.

N.B.—This defendant being out on bail under section 743 (5) of the Criminal Code and having surrendered herself into custody on the above judgment being delivered, was under section 761 of the Code brought in before the Supreme Court in banco, at Halifax, Nova Scotia, on the last day of the January session 1903, on February 14th, 1903, and a sentence was pronounced by Graham, E.J., the trial Judge (he being one of the Judges of the said Court then sitting), of three months' imprisonment absolute in jail and in addition a fine of \$100, and in default of payment six months in jail.

Note: Corroboration required in certain cases—Cr. Code, sec. 684.

The legal principle deducible from the above decision as set forth in the head-note is probably correct. The judgment appears to assume, however, that the evidence of Sarah Carter, a full note of whose deposition is given in the report, contains in itself proof that the house was one of ill-fame. It is submitted that such a deduction is not warranted by her evidence alone and that there was, therefore, no corroboration in any "material particular by evidence implicating the accused" as sec. 684 of the Code demands.

The decision in *Cole v. Manning* (1877), 2 Q.B.D. 611, which seems to have been much relied upon, was upon a very different state of facts, and its applicability to the present case is doubtful.

In *Cole v. Manning* (1877), 2 Q.B.D. 611, it was held by Mellor and Field, JJ., upon a case stated by a magistrate, that upon the hearing of a complaint in bastardy, the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her and the defendant, although these acts have taken place at a time before the child could have been begotten; and that such evidence constituted a corroboration of the mother "in some material particular." (35 and 36 Vict. (Imp.) c. 65, s. 4.)

Mellor, J., said:

"No rule of law excludes testimony as to acts of familiarity before the time when the bastard child could have been begotten; and evi-

Note—Continued.

Corroboration required in certain cases—Cr. Code, sec. 684.

dance of that kind shews at least a probability that the statement of the mother is true."

Field, J., in the same case said:

"The magistrate says that the acts of familiarity deposed to by the appellant's parents would have had a great effect upon his judgment if he had considered himself at liberty to take them into consideration as corroborative evidence. I know of no rule of law which prevented him from doing so."

At common law one witness was sufficient in all cases except perjury, 2 Hawk. c. 46, s. 2.

Corroboration of an accomplice was not necessary in strict law; *R. v. Atwood* (1787), 2 Leach C. C. 464; *R. v. Beckwith* (1859), 8 U. C. C. P. 274; but it is a long established rule to require corroboration of the evidence of accomplices. In order to induce the jury to credit the testimony of an accomplice, it is the practice for the prosecution to give other evidence confirmatory of at least some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest; and for the judge to direct the jury not to act on the uncorroborated testimony of an accomplice. Archibald's Crim. Evid., (1900), 361; *Re Mennier*, [1894], 2 Q. B. 415, 18 Cox C. C. 15. The confirmation of the accomplice's testimony is not sufficient if it is not confirmatory as to the person accused, i.e., if it does not implicate the accused, although it be confirmatory of the particulars of the story of the accomplice in other respects. *R. v. Webb* (1834), 6 C. & P. 595; *R. v. Wilkes* (1836), 7 C. & P. 272; *R. v. Farlar*, (1837), 8 C. & P., 106; *R. v. Dyke*, (1838), 8 C. & P. 261; *R. v. Jellyman* (1838), 8 C. & P. 604; *R. v. Birkett* (1839), 8 C. & P. 732; *R. v. Stubbs* (1855), Dears. 555.

And where upon an indictment against principals and accessories, the case against the principal was proved by an accomplice who was confirmed as to the accessories but not as to the principal, the jury were directed to acquit the prisoners. *R. v. Wells* (1829), M. & M. 326; *R. v. Moores* (1836), 7 C. & P. 270.

The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice, and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction. *Reg. v. Yates* (1841), C. & Mar. 132; *Champney's Case* (1836), 2 Lewin 258; *R. v. Wigley*, 2 Lewin 258 (n); 3 Starkie Evid. 860 (n) Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to shew that one party is more to be believed than the other. *R. v. Boulter* (1852), 5 Cox C. C. 543; 3 Car. & Kir. 236. And it has been held that a letter written by the accused contradicting his statement upon oath

Note—Continued.

Corroboration required in certain cases—Cr. Code, sec. 684.

would be sufficient to make it unnecessary to have a second witness. *R. v. Mayhew* (1834), 6 C. & P. 315.

Section 684 of the Criminal Code of Canada, 1892, as amended in 1893, enacts as follows: "No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

- (a) Treason, Part IV., section 65.
- (b) Perjury, Part X., section 146;
- (c) Offences under Part XIII., sections 181 to 190, inclusive;
- (d) Procuring feigned marriage, Part XXII., section 277;
- (e) Forgery, Part XXXI., section 423."

This section originated with 32 & 33 Vict., ch. 19, sec. 54 (D.), which abolished the incapacity of interested witnesses, but with a proviso that the evidence should be insufficient unless corroborated by "other legal evidence in support of the prosecution." The corroboration required by that statute was held not to be the corroboration of the evidence of the person interested in every material particular, but the corroboration of it in some material particular tending to support the prosecution. *R. v. Bannerman* (1878), 43 U.C.Q.B. 547.

On an indictment for forgery of prosecutor's name as endorser of a promissory note, the prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he himself was unable to write his name, being in fact a marksman. A son of his also swore that his father was unable to write his name and was a marksman. Another witness also proved that he had known the prosecutor three or four years, and knew that he could not write. It was held that the evidence of the son and of the other witness to the effect that the prosecutor was unable to write his name was "other legal evidence in support of the prosecution" within the meaning of the section, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the burden was then on the prisoner to shew as a defence that he was authorized to use or write the prosecutor's name. *R. v. Bannerman* (1878), 43 U.C.Q.B. 547.

In a charge of forgery, it was held that the corroboration must be that of another witness, and not merely the evidence of the same witness on another point. *R. v. McBride* (1895), 2 Can. Cr. Cas. 544, 26 Ont. R. 639.

In *Regina v. Giles* (1856), 6 U.C.C.P. 84, the prisoner, Elizabeth Giles, was indicted for forging an order in the name of David Akenhead for the delivery of goods. The only witnesses who were examined at the trial were the person whose name was forged and the person to whom the order was addressed, and who delivered the goods on the forged order. The Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.,) held that there

Note—Continued.

Corroboration required in certain cases—Cr. Code, sec. 684.

was not sufficient evidence to support a conviction, having regard to the statute 10 & 11 Vict., ch. 9, sec. 21, by which the evidence (by that Act made admissible) of persons interested or supposed to be interested in respect of any writing given in evidence "shall in no case be deemed sufficient to sustain a conviction for any of the said offences, unless the same be corroborated by "other legal evidence in support of such prosecution." Draper, C.J., delivering the judgment of the court said:

"There is the same and no other proof to go to the jury on either count to shew the order forged; that evidence is given by the party whose name is alleged to be forged and his denial is complete, adding, as a circumstance, that he cannot write. But there is no corroboration of his testimony—i.e., there is no one material fact proved by him which is proved either by other direct testimony or by the proof of other facts which go to establish the truth of any material part of his statements. The only other witness examined was the person who advanced goods on the faith of the order being genuine. He did not know that Akenhead could not write or he would not have accepted the order. He believed it genuine until some months after when Akenhead denied it. The false representation made by prisoner as to her own name would be a very material fact to establish a guilty knowledge on her part, if the fact that the note was forged were established; but until that is done this false statement wants significance, and I think it would be going too far to treat it as a corroboration of the statement of Akenhead that the order was a forgery."

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., AND HANNINGTON, LANDRY, BARKER AND
McLEOD, JJ.

THE QUEEN v. CAHILL.

*Canada Temperance Act—Intoxicating liquor sent by express, c.o.d.—Passing
of property—Delivery by express agent—Receipt of price.*

1. Where intoxicating liquors are sold in a district where the Canada Temperance Act is not in force to be delivered by express C.O.D. at a place where the Act is in force, the express agent who makes the delivery and collects the price is not thereby guilty of the offence of selling contrary to the Act.

ARGUED: June 6th, 1900.

DECIDED: November 29th, 1900.

RULES absolute for certiorari and rules nisi to quash had been granted in the above two cases, in one of which one Trenholm had been convicted under the Canada Temperance Act of unlawfully selling intoxicating liquor, and in the other one Mitton had been convicted for a similar offence, Walter Cahill being the convicting magistrate in both cases. The facts and the grounds upon which the rules were granted appear in the judgment of Mr. Justice Barker.

FREDERICTON, N.B., June 6, 1900.

McCully shewed cause against the rules nisi to quash.

McLean, Q.C., in support of the rules.

FREDERICTON, November 29, 1900.

BARKER, J.:—The same point is involved in these two cases. Trenholm was convicted on the 27th of February last for unlawfully selling intoxicating liquor contrary to the provisions of the Canada Temperance Act in the Parish of Botsford, in the County of Westmorland, between the 13th of November, 1899, and the 12th of February, 1900. The conviction took place before Walter

Cahill, a stipendiary magistrate for Westmorland County, and Trenholm was fined \$50 and \$16.20 costs.

Mitton was convicted on the 6th of March last for unlawfully selling intoxicating liquor contrary to the provisions of the Canada Temperance Act in the Parish of Sackville, in the County of Westmorland, between the 13th of November, 1899, and the 12th of February, 1900. This conviction also took place before Walter Cahill, a stipendiary magistrate for Westmorland, and Mitton was also fined \$50 and \$8.45 costs.

The evidence shews that one Stephen Trenholm, who was living in Botsford, in the County of Westmorland, ordered some whisky from one Laney, a merchant residing and doing business in Amherst, Nova Scotia, directing it to be forwarded to him by the Dominion Express Company, c. o. d. The company, in due course of business, forwarded the package to Stephen Trenholm, the purchaser, and it was delivered to him at Botsford by Snowball Trenholm, the company's agent at that place, to whom the purchaser paid the price and charges, which were remitted by the agent in the ordinary way of their business to the Amherst agent.

Mitton was the express company's agent at Port Elgin, in Sackville, and as such received at that place, in the ordinary course of business, a package of whisky, which one Anderson, of that place, had purchased from Laney at Amherst, with directions to have it forwarded c. o. d. by express. On receipt of the package Mitton delivered the parcel at Port Elgin to Anderson, the purchaser, who paid him the purchase money and charges, which he also, in the ordinary course of business, remitted to the company's agent at Amherst.

The goods in both cases were purchased in Amherst from Laney, who delivered them there to the express company for carriage and delivery to the purchasers in Westmorland, and this delivery and the collection of the purchase money took place in the County of Westmorland through the local agents of the company at the place of delivery. That is the only connection of

these defendants with the transaction at all. The argument is that the sale by Laney was not complete until the property passed, and that the property did not pass until the delivery, which took place in Westmorland. If all this is admitted, it does not help very much, because if it is assumed that a delivery of the liquor as well as a sale is necessary to complete the offence of selling, it is clear that when the delivery is made it completes the sale, which took place at Amherst, and was a sale there by Laney, who owned the goods. These defendants never sold the whisky; they never owned nor had anything to do with it, except to deliver it as employees of the express company, to whom Laney had delivered it for the purpose in Amherst. These defendants are in no way in the employment of Laney, and, in my opinion, are in no sense liable to the penalties which have been imposed on them. It seems to me to be a very extraordinary construction to place upon the Act to hold that if a person residing at Moncton orders a quantity of whisky from a merchant in England, deliverable to him in Moncton, so that the property in the whisky would not pass until delivery, that the man who delivered the goods on the part of the carrier could be convicted of unlawfully selling the whisky. The delivery is not the sale, and the delivery is not unlawful.

I think that these convictions must be quashed.

LANDRY, J.:—I do not dissent from the judgment of my brother Barker, but I wish to say that I have some doubts as to these cases.

MCLEOD, J.:—This is simply a question of goods bargained and sold. One can go to Amherst and purchase goods, and when the minds of the vendor and purchaser meet and the goods are set apart the property in them will pass. All that Trenholm did was to deliver, in the ordinary course of business, a parcel of goods and collect the charges. He did nothing towards passing the property and making the sale.

TUCK, C.J., and HANNINGTON, J., agreed with BARKER, J.

Rules absolute to quash convictions.

Note: *Illegal sale of intoxicating liquors—Place of sale—Appropriation of goods before delivery.*

A person licensed at Worcester having a beer business, and an agent at Cheltenham, who took orders for spirits and sent them to Worcester, from which place the spirits were sent, was rightly convicted under the "Imperial Excise Licenses Act, 1825," 6 Geo. 4, c. 81, for selling spirits by retail at Cheltenham. *Stallard v. Marks*, L.R. 3 Q.B.D. 412; 47 L.J. 91; 42 J.P. 349. But where A. resided and had an office at C. as agent for a firm of implement makers, and was agent and representative of P. & Co., of B., wine and spirit merchants, whose name did not appear, nor did they store goods upon the premises, and his duties were to collect orders and travel about, the Q.B. Division held it was a question of fact for the justices, and as they had found that A. was a bona fide commercial traveller, their finding could not be interfered with, and he was not liable to take out a license for sale at his office of spirits which were delivered by P. & Co., who received payment. *Stuckberry v. Spencer*, 55 L.J. 141; 51 J.P. 181.

P., a brewer, had an off beer license to sell at B. His carter collected orders weekly, and in the regular course of dealing delivered a gallon of beer at A, ordered there of him the previous week, and received payments for the beer supplied and the empty jar. The Q.B. Division held that the sale was at the house of the customer. The conviction of P. was affirmed. *Pletts v. Campbell*, [1895] 2 Q.B. 229; 64 L.J. 225; 59 J.P. 502. And see *Cocker v. McMullen*, 74 J.P. 245; 19 Cox C.C. 429.

In a subsequent case it was proved that the customer gave an order to the defendant's traveller at A., and at his request signed a postcard requesting a weekly delivery and assenting to the appropriation of it for him at the brewery at B., and handed the card to the traveller, who posted it at A. The bottles were set aside at B. and a label was attached to the bottles containing the address of the customer at A. The beer was delivered in the usual course by the carter and the traveller called occasionally to see if there were any changes in the order. The court distinguished this case from *Pletts v. Campbell*, and held that the selection of the bottles was a sufficient appropriation and that the sale took place at B. *Pletts v. Beattie*, [1896] 1 Q.B. 519; 60 J.P. 185.

The distinction between the latter case and *Pletts v. Campbell* is that in that case the material elements of the transaction, i.e., the order, its acceptance and the delivery of the goods took place at the customer's house, but in the later case the order was sent by post to the brewery and there accepted and the appropriation of goods to the order took place there. *Stone's Justices' Manual* (1902) 472 (b).

Brewers had an office in which orders were received, but no stock was kept. Subsequently the order was received at the licensed place, and certain bottles of beer were appropriated to the order and delivered at appellant's house. The Q.B. Division followed *Pletts v. Beattie*, and held

*Note—Continued.**Illegal sale of intoxicating liquors—Place of sale—Appropriation of goods before delivery.*

the order was accepted where the goods were appropriated. *Stephenson v Rogers*, 63 J.P. 230; 80 L.T. 183.

A transfer of liquors in bond stored in a bonded warehouse with the duty unpaid on the same in a district where the Canada Temperance Act is in force has been held in Prince Edward Island to be an offence against the Act. *Ex parte Morris* (1897), 34 Can. Law Jour. 46, (per Supreme Court of P.E.I., Hodgson, J., dissenting). The dissenting judge expressed the opinion that the Act did not apply to such transactions, and that the transfer of bonded goods creates legal obligations between the transferee and the Crown which are incompatible with the transaction being a criminal offence, and that an illegal sale under the Canada Temperance Act is a crime.

In *The Queen v. Hazell* (1899), 2 Can. Cr. Cas. 516, it was held by Judge Hamilton, County Judge of Halton, that a person licensed to sell liquors by retail at certain premises only is not guilty of making an illegal sale in obtaining orders from customers in another licensed district and putting up the liquors at and forwarding them from the licensed premises. But see note to that case in 2 Can. Cr. Cas. 518-521.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE KING v. VENOT.

Habeas corpus—Return—Two warrants of commitment for same offence—No intention shewn that second in substitution for first irregular warrant—Theft—Summary trial—Cr. Code secs. 305, 785, 786.

1. Where a return to a writ of habeas corpus, or to an order of the nature of such writ, specifies two warrants of commitment for the same offence, and neither the second warrant nor such return declares the second warrant to be in substitution for or in amendment of the first which is irregular and bad, the prisoner should be discharged.

ARGUED: January 23 and 27, 1903.

DECIDED: January 27, 1903.

MOTION on notice to the Attorney-General of Nova Scotia and to the convicting magistrate on the return of an order in the nature of a writ of habeas corpus made under chapter 181 of the Revised Statutes of Nova Scotia, 1900, "Of Securing the Liberty of the Subject," for the discharge from St. Patrick's Home, a public and reformatory prison at Halifax, of the defendant Alexander Venot, a prisoner in the said home under a warrant of commitment in execution signed by the stipendiary magistrate of the Town of Dartmouth, and reciting a conviction had against him under section 783 (a) of the Code, on January 9th, 1903, "for that he, the said Alexander Venot, did in the Town of Dartmouth, on or about the 24th day of December, A.D., 1902, fraudulently and without color of right take and fraudulently and without color of right convert to his own use one stove, of the value of \$5.00, the property of one Robert Wirrell, with intent to deprive the said Robert Wirrell absolutely of the said stove, and for which he was adjudged to be detained in the said home for the space of one year."

The keeper of the said home made the following return:—

"I, Brother Lawrence of Halifax, in the County of Halifax, Christian Brother, the keeper of St. Patrick's Home at Halifax,

hereby return to His Lordship, the Honorable Mr. Justice Ritchie, that Alexander Venot, within named, was detained in St. Patrick's Home at Halifax, the said Home being a public and reformatory prison, under a warrant of commitment made and dated the 9th day of January, A.D., 1903, by Frank W. Russell, Esq., Stipendiary Magistrate in and for the Town of Dartmouth, a copy of which warrant, marked 'A,' I hereto annex, and that the said Alexander Venot came into my custody under said warrant on the last-mentioned day, and was detained on said warrant until the 22nd day of January, A.D., 1903, when, the said Alexander Venot being still in my custody, the said Stipendiary Magistrate caused to be delivered to me a certain other warrant of commitment, a copy of which I hereunto annex, marked 'B,' and the said Alexander Venot has ever since been detained under said last-mentioned warrant, and is now so detained under said last-mentioned warrant, and for no other reason or cause whatsoever.

"Dated at St. Patrick's Home in the City of Halifax this 22nd day of January, A.D., 1903.

"BROTHER LAWRENCE, (L.S.)

"Keeper of St. Patrick's Home, a public and reformatory prison at Halifax."

The warrant marked "A" in the return, and signed and sealed by the Stipendiary Magistrate of the Town of Dartmouth as of the same date as the conviction commenced thus: "Whereas, Alexander Venot was on this day convicted in the Police Court in the Town of Dartmouth, before the undersigned Stipendiary Magistrate in and for the said Town of Dartmouth, and one of His Majesty's Justices of the Peace in and for the said county, for that, etc." (then followed the statement of the offence as above, the adjudication of imprisonment and a direction to the constable to convey the prisoner to the home, and to the keeper to detain him there according to the sentence).

The warrant marked "B," and signed and sealed by the same Justice also as of the same date as the conviction, began in these

words: "Whereas, Alexander Venot, a Roman Catholic and apparently under the age of sixteen years, was on this day convicted in the Police Court for the Town of Dartmouth, before the undersigned Stipendiary Magistrate in and for the said Town of Dartmouth (he, the said Alexander Venot, consenting to be tried summarily before the said Stipendiary Magistrate), for that, etc."; followed by the same charge, sentence and direction as in the foregoing warrant.

The application was made on the following grounds:—

1. That the return was bad, (a) because the first warrant, marked "A," did not show on its face a conviction that the Magistrate had jurisdiction to make, inasmuch as it did not allege that the prisoner was "charged" before him with the offence therein stated, and consented to a summary trial of the same; (b) because it did not appear from the return or from the warrant itself marked "B," that the said warrant was substituted in lieu of or in amendment to the first.

2. That the record of conviction filed by the Magistrate, acting as he supposed, under section 801 of the Code, in the office of the Prothonotary of the Supreme Court at Halifax as the "Court discharging the functions of a Court of general or quarter sessions of the peace," and on which the said warrants were issued, was void, because it alleged that the offence was committed "on or about the 24th day of December, A.D., 1903," being a day subsequent to the proceedings before the justice and one that never happened, and further that the said conviction having been so filed could not be amended by stating that the offence was committed "on or about the 24th day of December, A.D. 1902."

3. That no offence, either at common law or under the statute appeared by the conviction or return, inasmuch as neither of them stated that the acts of *fraudulent taking and converting without colour of right, etc.*, alleged to have been committed by the prisoner, amounted to "theft" or "stealing," and that the statement of the offence in that form and in the above charge submitted a question of law for the jury to determine.

HALIFAX, January 23 and 27, 1903.

John J. Power and *Osmond R. Regan*, for the prisoner: as to the first ground they referred to *R. v. Sears*, 17 C.L.T. 124; *Paley on Convictions*, 7th ed. 233, 271, and *In re Elmy v. Sawyer*, 1 A. & E. 843. As to the second ground, 2 Hawk. P.C.C. 25, ss. 77 and 83; 2 Hale 177 and 178; *R. v. Learmont*, 23 N.S.R. 24; *Paley on Convictions*, 7th ed. p. 347; *Marshall's Nova Scotia Justice*, p. 499. As to the third ground, to the Criminal Code, s. 305; *R. v. Switzer*, 14 U.C.C.P. 477.

No one contra.

HALIFAX, January 27, 1903.

RITCHIE, J.:—I think the return to the order is bad because neither it nor the second commitment shews that the justice intended to amend the first warrant or substitute the second one for it. The case of *In re Elmy & Sawyer*, 1 A. & E. 843, and the different judgments there given seem to be in point. The prisoner must be discharged. I think more care should be taken in making the return to an order in the nature of a habeas corpus, and in a case like this it should have been carefully prepared by a solicitor.

Order for discharge of prisoner with protection to keeper of home, and by consent of prisoner to committing magistrate.

Prisoner discharged.

Note: *Practice in habeas corpus proceedings.*

In support of the application for the writ, unless it be founded on apparent defect in the commitment, an affidavit should be made, stating the circumstances under which the applicant considers himself entitled to relief for if, on a bare request this writ were issued, any person, even a felon, when under sentence of death, might procure a temporary suspension of his confinement. 2 Mod. 306; 1 Lev. 1; 3 Bla. Com. 132; *Hand's Prac.* 73.

It is to be directed to the person in whose custody the applicant is actually detained, whether he be an officer concerned in the public administration of justice, or a private individual, who under any pretence as that of lunacy, detains another against his will. *Godb.* 44; *Bac. Abr. Habeas Corpus*, B. 6. An habeas corpus directed in the disjunctive to the sheriff

*Note—Continued.**Practice in habeas corpus proceedings.*

or gaoler, is bad; but where a party is taken by a warrant of the sheriff, the writ must be directed to him; for in contemplation of law, the prisoner is in his custody, and the writ must be returned with the body; but where the prisoner has been immediately committed to the custody of the gaoler, as in all criminal cases, it must be directed to him. *Salk.* 350; *Lord Raym.* 586, 618; *Bac. Abr. Habeas Corpus* 6. The writ is then delivered by the prisoner's solicitor to the proper person to whom it is directed.

The party to whom the writ of habeas corpus is directed, is, by the provisions of the statute of Charles the second, bound to return the body within the space of three days, if within twenty miles; ten days within a hundred miles: and within twenty days for any greater distance; and if he refuse so to do, he is liable for the first offence to a penalty of 100*l.*, and for the second of 200*l.* 31 *Car. 2, c. 2*; see form of returns, *Hand's Prac.* 521. There are some cases in which the person is warranted in returning, instead of the body, the reasons of the prisoner's detention. Thus by the express exception of the statute, he is not obliged to bring up one who is charged with treason or felony, plainly expressed in the warrant of commitment; or in prison for any civil cause of action, or in execution upon process after judgment, from any court of competent jurisdiction. The return must shew by whom and for what cause the prisoner was committed. *Cro. Car.* 507; *Vaugh.* 37; 2 *Inst.* 55; *Com. Dig. Habeas Corpus, E. 1.* A return, however, alleging him to have been committed on suspicion of treason, has been held sufficient. *Palm.* 558; *Com. Dig. Habeas Corpus, E. 2.* And it will not be rendered invalid by mere want of form, if it discloses a good cause of detainer. 5 *Mod.* 22; 1 *Salk.* 348; *Com. Dig. Habeas Corpus, E. 2.*

The remedy for a false or improper return, is by an action on the case against the officer, at the suit of the party aggrieved to recover damages; and by indictment for the injury to public justice. *Salk.* 349; 6 *Mod.* 90.

When the body is returned by the officer to whom the writ is directed, he is to certify the day and cause of the caption and detainer, as in case of an excuse for not bringing the individual. *Vaugh.* 137; *Bac. Ab. Habeas Corpus, B. 9.* At the same time, the magistrate, in obedience to a certiorari usually issued from the crown office with the habeas corpus, returns the depositions upon which the commitment was founded, in order that the court may be furnished with the means of judging in what way they should dispose of the prisoner. 3 *East*, 157. But where the party is in custody under the sentence of a court of competent jurisdiction to try his offence, it is sufficient to return that fact, without stating the particulars of the original charge against him; nor, if the commitment were made out by order of a court of record, is it necessary to set it forth in its precise language, as must be done when it is merely given under the hand of an individual magistrate. 3 *Salk.* 92, 3.

When the prisoner, with the depositions and warrant of commitment, with the habeas corpus, are duly returned, the court are to consider whether

Note—Continued.*Practice in habeas corpus proceedings.*

they will discharge, bail, or remand, him; and they may take a reasonable time for this purpose, and may bail him *de die in diem*, or direct him to be detained in custody, till they have come to a decision. 5 Mod. 22; Bac. Ab. Habeas Corpus, B. 13. The King's Bench may remand him to the same gaol from whence he came, and order him to be brought up from time to time, until they have determined to discharge, or order him to be detained in prison. Vent. 330, 346; Bac. Ab. Habeas Corpus, B. 13. Upon the writ being returned, the counsel for the prisoner may move to file the return, and that the prisoner may be called into court and the return read, which being done, the counsel may proceed to argue the illegality of the commitment, and his right to be discharged or bailed. 1 Chitty Cr. Law 128.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE SIR WILLIAM RALPH MEREDITH, C.J.C.P.,
PRESIDING AT THE MIDDLESEX ASSIZES.

THE KING v. HERBERT.

Murder—Complicity of two persons jointly indicted—Plea of guilty by one prisoner—Acquittal of other prisoner on plea of not guilty—Subsequent application to change plea of "guilty" to "not guilty"—Special circumstances—Guilt of prisoner applying to change plea, inconsistent with verdict acquitting other defendant—Cr. Code secs. 227, 231.

1. Where two persons are jointly indicted for murder and one pleads guilty and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted the other defendant to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal already given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty.

ARGUED: January 15, 1903.

DECIDED: January, 15, 1903.

Application for leave to change a plea of guilty to one of not guilty.

Gerald Sifton and Walter Herbert, the latter a young farm labourer aged 20, had been indicted together on a charge of having wilfully murdered Joseph Sifton, father of said Gerald Sifton.

The motive assigned for the alleged murder was that the impending marriage of Joseph Sifton who was an elderly widower owning considerable property would seriously affect the financial prospects of Gerald who was his father's only child, especially if, as was believed, the girl the old man was about to marry was then pregnant by him.

On the morning of Saturday, 30th June, the day on which the marriage was to take place, Joseph Sifton and the young girl he was to marry were at Joseph Sifton's place; Gerald Sifton and Walter Herbert came, and Joseph Sifton was asked to go to the barn to give directions as to fixing a hay fork; he went reluctantly, and while there he sustained severe injuries; he was taken into the house and lingered unconscious for several hours, and died. What occurred at the barn is known only by the evidence of Walter Herbert.

The case when it happened was regarded as an accident; it was stated by Walter Herbert and by Gerald Sifton at the time to be an accident, a fall from a beam of the barn; the doctor who was called in gave his certificate to that effect, believing at that time that it was an accident; no autopsy was held at the time, and the body was buried. Afterwards suspicions arose, investigation was set on foot; both Walter Herbert and Gerald Sifton were arrested, and Herbert then said, "Yes, I am guilty." Both men were addicted and arraigned together before the late Justice Rose, at the assizes of September, 1900, when Gerald pleaded not guilty, and Herbert pleaded guilty. Gerald's trial was postponed, and Herbert's sentence deferred. Shortly afterwards Mr. Justice Rose died.

After postponements Gerald Sifton was put on his trial before Mr. Justice MacMahon in the fall of 1901, when the jury disagreed.

After further postponements Gerald Sifton was again put on his trial before Mr. Justice Britton in November, 1902. The principal witness was Walter Herbert, the only possible witness besides Gerald Sifton, the accused, to the fact which caused the death. Herbert swore to a conversation with the accused early

on the morning of the 30th, at which the accused offered him a reward to go with him and help him to murder the old man, and to be prepared to testify that it was an accident; and told of the blows struck by each of them on the old man's head with an axe; of his being stunned by the blows, and thrown out of the barn on to the ground below, when more blows on the head were given to finish the deadly work.

The theory of the defence was that the death was accidental; that Herbert's evidence must be untrue, because the appearance of the skull as deposed to by those who made the autopsy, was inconsistent with the many blows by the axe deposed to, but was consistent with an accidental fall from the beam of the barn as stated at the time of the death. A will in the handwriting of one Morden and purporting to have been signed by Joseph Sifton in the presence of Morden and Morden's wife had been presented for probate but had been held to be a forgery by the verdict of the jury in a civil action. The forged will pretended to devise all of Joseph Sifton's estate to the girl McFarlane whom he was to marry and to make Morden the sole executor. It was suggested by the defence that Herbert's confession was part of a scheme concocted with Morden to draw money from Gerald Sifton.

After three and a half hours' deliberation the jury came into Court and said there was no chance of their agreeing; but after being locked up again for not quite half an hour they again came into Court, this time with a verdict of "Not guilty." Gerald Sifton was thereupon discharged.

Application was now made before Chief Justice Meredith on behalf of Herbert for leave to change his plea of guilty to one of not guilty.

LONDON, Ont., January 15, 1903.

E. Meredith, K.C., and *T. G. Meredith*, K.C., for the prisoner.

Magee, K.C., for the Crown stated that he had been instructed in the event of the plea being changed that no evidence should be offered. Except for the fear that a dangerous precedent might be established the application would not be opposed. If the application were granted the Crown would not further prosecute the indictment.

MEREDITH, C.J.:—The Court has power to permit the accused, at all events where sentence had not been pronounced, to withdraw his plea of guilty. There remains, therefore, only the question whether this is a proper case in which to exercise the discretion.

I do not think there is any danger that this case will form a dangerous precedent, because I venture to believe that on searching the records of this country, or of the Court of the British Empire, no case can be found in which the circumstances are such as existed in this case. Now, if I grant the application, it will be competent for the Crown—indeed, that would be the ordinary course—to place the prisoner upon his trial, and the evidence which he gave upon the trials of Sifton could be used against him, and the jury might upon that evidence convict him.

Mr. *Magee* has intimated that if this application succeeds the Crown will not further prosecute the indictment. The responsibility of taking that course is upon the Crown. I am not questioning the propriety of that course, but it does seem to me that it would be almost a scandal that I should here solemnly pronounce sentence of death on the plea of guilty, when the Crown says if that plea were not there, the prisoner would not be further prosecuted, but would be allowed to go free. It is the most cogent circumstance that could be adduced in favour of my granting the application.

The circumstances are peculiar. The prisoner has not only confessed, but has twice under oath repeated the avowal of his guilt and the complicity of Gerald Sifton in the murder of the man Joseph Sifton. No doubt that is a very strong circumstance against the accused. But there is, as the facts have been

stated in argument, no theory that can be suggested upon which Sifton could be innocent and the prisoner guilty.

If it were possible that Herbert could be guilty and Sifton innocent, the case would suggest an altogether different aspect. The jury upon consideration of the whole case have pronounced Sifton not guilty. This being so, it seems to me that I should exercise my discretion in favour of permitting the accused to withdraw his plea.

It is not for me to suggest reasons why the accused should have pleaded guilty, though he was not guilty. One might think that in some cases a young man accused of a capital offence might, especially if suggestion had come to him, have thought it best, though not guilty, to plead guilty, expecting that the Crown, if he gave his testimony against his accomplice, would exercise its clemency in his favour. I do not suggest that this was so, but looking at the circumstances I find that the acquittal of Sifton was absolutely inconsistent with the guilt of the accused.

It would be entirely opposed to the whole policy of the English and Canadian law to permit the prisoner to be sentenced to death upon his plea of guilty. It is more consistent with the traditions of the Court to be merciful to the accused.

The responsibility for the course ultimately taken, whether it be to proceed with the trial or to offer no evidence, must rest upon those who are charged with the administration of justice.

Leave granted to change plea.

. N.B.—A jury was empanelled, and on being sworn, the Crown offered no evidence, and the jury were instructed to acquit the prisoner, and a verdict of "Not guilty" was recorded accordingly. Herbert was then discharged.

[SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND SEDGEWICK, GIROUARD,
DAVIES AND MILLS, JJ.

MCCLEAVE v. CITY OF MONCTON.

*Police constable—Negligent performance of duty—"Respondeat superior"—
Liability of municipal corporation—Canada Temperance Act—Illegal
destruction of liquors seized.*

1. A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible for such negligence in provinces where the English common law applies.

ARGUED: February 19, 1902.

DECIDED: February 19, 1902.

APPEAL from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff at the trial and ordering judgment to be entered for the defendant.

The plaintiff kept a hotel in the City of Moncton, N.B., and, in 1899, was convicted by the Police Magistrate of an offence against The Canada Temperance Act, which was in force in the city. The conviction was quashed on certiorari, see *Ex parte McCleave*, 5 Can. Cr. Cas. 115, on the ground that one Belyea, a police officer and constable, had laid the information and, afterwards, illegally executed the search warrant issued thereon. The plaintiff brought an action against the city, claiming damages for an unlawful entry into his hotel and carrying away liquors therefrom, and for the value of the liquor which was destroyed under the provisions of the Act.

The plaintiff obtained a verdict at the trial with \$300 damages. On motion by the defendant to the Court en banc to have this verdict set aside and a verdict entered for the defendant, or, failing that, for a new trial, or, failing both, for reduction of the damages, the Court ordered the verdict to be set aside and a verdict entered for defendant, holding that the city was not liable for the act of the police officer in executing the warrant issued on his own information. The plaintiff appealed.

OTTAWA, February 19, 1902.

Teed, K.C., for the appellant, cited *Henly v. Mayor of Lyme*, 5 Bing. 91; *Borough of Bathurst v. Macpherson*, 4 App. Cas. 256; *Cowley v. Mayor of Sunderland*, 6 H. & N. 565; *Mersey Docks Trustees v. Gibbs*, L.R. 1 H.L. 93; *Gilbert v. Corporation of Trinity House*, 17 Q.B.D. 795; *McSorley v. City of St. John*, 6 Can. S.C.R. 531.

Chandler, K.C., for the respondent. The city did not authorize nor direct the acts of which the plaintiff complains, nor could it legally give any authority to commit such acts. The general principle governing in this case is found in *McSorley v. The City of St. John*, 6 Can. S.C.R. 531. The police officer acted independently as a public officer enforcing a statute and his acts and proceedings were beyond the control of the respondent. A municipal corporation is not liable, where the acts complained of were done by officers whose powers and duties were enjoined and granted, for the benefit of the general public, and delegated as a convenient method of exercising a function of general government. *Bailey v. The Mayor, &c., of New York*, 3 Hill (N.Y.) 531; *Main v. St. Stephen*, 26 N.B. Rep. 330; *Hill v. City of Boston*, 122 Mass. 344, and cases there discussed; *Buttrick v. City of Lowell*, 1 Allen [Mass.] 172; *Hafford v. City of New Bedford*, 16 Gray [Mass.] 297; *Rousseau v. Corporation of Lewis*, 14 Que. L.R. 376; *Winterbottom v. London Police Commissioners*, 1 O.L.R. 549. The maxim "respondeat superior" has no application under the circumstances of this case.

OTTAWA, February 19, 1902.

The judgment of the Court was delivered by

THE CHIEF JUSTICE (Oral).—We are all of opinion that the judgment appealed from is right and that the proper distinction has been drawn by Mr. Justice Gregory in coming to the conclusion that the city cannot be held liable for the acts of the constable Belyea in his effort to secure the observance of the statute.

In a case cited by Mr. Justice Gregory, *Buttrick v. The City of Lowell*, 1 Allen [Mass.] 172, Chief Justice Bigelow, in delivering the judgment of the Supreme Court of Massachusetts, whose decisions are justly entitled to the greatest respect, says:—

“Police officers can in no respect be regarded as agents or officers of the city. Their duties are of a public nature. Their appointment is devolved on cities and town by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are entrusted are derived from the law, and not from the city or town from which they hold their appointment. For the mode in which they exercise their powers the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as agents or servants of the city.”

And again he says:—

“If the plaintiff could maintain his position that the police officers are so far agents or servants of the city that the maxim “*respondeat superior*” would be applicable to their acts, it is clear that the facts agreed would not render the city liable in this action, because it plainly appears that, in committing the acts complained of, the officers exceeded the authority vested in them by the by-law of the city.”

This language is in effect repeated by Dillon in his work on *Municipal Corporations* (4th ed.) sec. 974, in discussing the applicability of the maxim “*respondeat superior*.” He says:—

“When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal enquiry is, whether they are the servants or agents of the corporation . . . If . . . they are elected or appointed by the corporation in obedience to a statute, to perform a public service, not peculiarly local, for the reason that this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and as to the manner of discharging their duties, they are not to be regarded as servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers with such powers and duties as the state confers upon them, and the doctrine of ‘respondeat superior’ is not applicable.”

I quite agree upon the question of fact with the court below that Belyea held his appointment from the corporation for the purpose of administering the general law of the land, and that the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely.

It must, however, be added, in order that there may in future be no misunderstanding as to the effect of this decision, that in respect to torts, the law of Quebec may be quite different, and that, therefore, the decision in this case ought not to bind this Court in any cases of a similar nature occurring in the Province of Quebec. We have here to apply the common law as to torts as administered by the English Courts solely, while in Quebec such matters are governed wholly by the provisions of the Civil Code. I make these observations in consequence of what fell from my brother Girouard during the argument.

The appeal must be dismissed with costs.

Appeal dismissed.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF QUEBEC.

BEFORE SIR L. N. CASSAULT, C.J.

MERCIER v. PLAMONDON.

Summary conviction—Certiorari—Moneys received by magistrate under the conviction—Recovery after conviction quashed—Vagrancy—Cr. Code 207—Art. 833, C.C.P. (Que.)

1. A justice of the peace, whose decision is attacked under a writ of certiorari, is an officer subject to coercive imprisonment, in the province of Quebec, for failure to deposit in Court, when ordered, all moneys received by him under the conviction.

QUEBEC, March 24, 1902.

SIR L. N. CASSAULT, C.J.:—In this case, the respondent Plamondon, as justice of the peace, had condemned the petitioner to pay a fine of \$25 and costs, or to suffer three months imprisonment. On motion for certiorari, this conviction was quashed (*Vide The King v. Mercier* (1901), 6 Can. Cr. Cas. 44).

The petitioner, who, to be liberated from the jail, had to pay the fine and \$16.41 besides for costs, moved to have the justice of the peace compelled by coercive imprisonment to repay to her the said sum.

This motion was granted only to the extent of \$25, since the \$16.41 had not been collected by the justice of the peace, but by a third person, the Court reserving the same recourse as above against this third person as to this sum of \$16.41.

Article 833, paragraph 2, C.C.P., says that all officers having the custody of moneys under their judicial authority may be liable to coercive imprisonment. A justice of the peace, under the circumstances above mentioned, is an officer who may be compelled by coercive imprisonment to bring into Court the moneys which he has received by virtue of his office. Motion granted, *nisi causâ*, April 1st, 1902.

Rule nisi granted.

Appollinaire Corriveau, solicitor for the petitioner.

Joseph Turcotte, solicitor for the respondent.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., IN CHAMBERS.

THE KING v. SITEMAN.

Summary trial—Release on suspended sentence—Procedure to bring offender up for sentence—Information under oath as to breach of recognizance—Summary trial and acquittal for second offence of same kind—Keeping disorderly house—Cr. Code sec. 198, 207 (j), 783, 971, 973.

1. Where after a summary trial the accused is convicted but is released on suspended sentence and a recognizance is taken binding the accused to keep the peace and be of good behaviour (Code sec. 971), the magistrate has no jurisdiction to impose sentence without an information under oath charging a breach of the recognizance (Code sec. 973).
2. Where such release on suspended sentence was in respect of a conviction for keeping a disorderly house, the fact that the accused had again been brought before the same magistrate on a similar charge which however was not substantiated, does not give the magistrate jurisdiction to impose the sentence which had been suspended in respect of the first charge.
3. *Semble*, a proceeding under sec. 973 to bring up for sentence an accused person who had been released on suspended sentence, can only be taken at the instance of the Crown.

ARGUED: November 7th, 1902.

DECIDED: November 7th, 1902.

THIS was an application for the discharge of the above-named prisoner under the provisions of chapter 181 of the Revised Statutes of Nova Scotia, "The Liberty of the Subject Act."

Defendant was convicted on 28th day of June, A.D., 1902, under section 783 of the Code by George H. Fielding, Esquire, Stipendiary Magistrate in and for the City of Halifax, for being an inmate of a disorderly house. The magistrate, under the provisions of section 971, conditionally released the offender to appear for sentence when called upon, she having entered into a recognizance as provided. Defendant was subsequently in September, 1902, tried for another offence of the same kind before the said George H. Fielding, and acquitted. The magistrate thereupon sentenced the accused under the June conviction. Counsel objected to his authority to sentence defendant, as she was not before him under the provisions of section 973 of the

Code. The magistrate, notwithstanding the objection of counsel, sentenced her to six months' imprisonment without the option of a fine.

HALIFAX, November 7th, 1902.

W. J. O'Hearn for the prisoner: Section 971 of the Code provides for the conditional release of offenders. That section makes good behavior a condition for release. Section 973 provides the machinery before the court if the recognizance is violated. This section does not give the Court the arbitrary power to bring an offender before it and deal with him. The Court will require some evidence of misconduct. See *R. v. Richardson*, 8 Dowling's Report, p. 511. Section 973 of the Code requires an information under oath and contemplates an adjudication as to the violation of the recognizance. Judgment can only be moved for against an offender in such a case by the Crown. See *R. v. Young*, 4 Can. Cr. Cas., p. 580.

M. U. Lenoir, for the Attorney-General of Nova Scotia: The defendant was before the magistrate and he could then deal with her. The information for the second charge, upon which she was acquitted, fulfils the requirements of section 973.

HALIFAX, November 7th, 1902.

TOWNSHEND, J., delivered an oral judgment discharging the prisoner from custody on the terms that she bring no action, holding that before the magistrate could sentence on the first conviction the defendant must be brought before him under the provisions of section 973 of the Code. In the present case she was not before him under any information that she had failed to comply with or observe any of the conditions of her recognizance, and, if she had been, the result of the trial shewed that she had not broken her recognizance. To justify the imposition of sentence for the original conviction, an information under oath must be laid charging her with a second breach, and a warrant issued

for her apprehension, and there seems to be authority in the case of *The King v. Young*, 4 Can. Cr. Cas. 580, for saying that such proceeding should be at the instance of the Crown.

Prisoner discharged.

Note: Release on suspended sentence—Cr. Code, sec. 971.

Sec. 971 of the Criminal Code 1892 was amended in 1900 to read as follows: "In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs."

The former section 971 enacted that in the case of an offence "punishable with not more than two years' imprisonment" (that is, two years being the maximum punishment for the offence) the court might under certain circumstances and on certain conditions, instead of sentencing the offender at once, direct his release on probation of good conduct.

Previous to the statutory enactment the court had this power without the restrictions to two years.

The power of releasing on a suspended sentence in the case of an offence punishable (as a maximum) with more than two years' imprisonment is reinstated by the addition of sub-section 2 but with the proviso that the prosecuting counsel concur.

Sub-section 3, *supra*, is the former sub-section 2 re-numbered.

Another change made by the amendment of 1900 is the substitution in the first subsection of the word "age" for "youth" in the recital of the circumstances having regard to which the power of conditional release is to be exercised.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE HUNTER, C.J.

HAYES v. THOMPSON.

*Liquor license — Saloons — Hotel bar-rooms — Sunday Observance By-law—
Validity of—R.S.B.C. 1897, cap. 144, sec. 50.*

1. A municipality has no power under sec. 50, sub-secs. 109 and 110, of the Municipal Clauses Act of British Columbia to pass a by-law closing any kind of licensed premises, except saloons.
2. A municipality is not empowered, by sec. 7 of the Liquor Traffic Regulation Act (B.C.) to pass any closing by-law, the intention of the section being to prohibit the sale, inter alia, during such hours as may be prescribed by the municipality under the authority of some other statute.
3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad.

DECIDED: July 10, 1902.

APPEAL by way of case stated from a summary conviction.
The by-law in question contained the following sections:—

“(2.) No person having a license to sell intoxicating liquors nor any keeper of licensed premises shall sell or allow, permit or suffer any intoxicating liquors to be sold on his premises between the hours of eleven o'clock on Saturday night and one o'clock on the Monday morning following, nor shall he allow any intoxicating liquors purchased before the hour of closing to be consumed on the premises, except in such cases where a requisition signed by a registered medical practitioner is produced by the vendee or his agent, and after three convictions under this by-law of selling or suffering to be sold or used, the license of said premises shall be forfeited and cancelled forthwith.

“(3.) The keeper of any licensed premises shall keep the bar-room, or room in which intoxicating liquor is trafficked in, closed as against all persons, other than members of his family or household, between the hours of eleven o'clock on Saturday and one o'clock on the Monday morning following, neither shall he allow, permit, or suffer any light to be used in the said room, and the glass in every window in such bar-room or room where

intoxicating liquor is vended shall be transparent, nor shall there be permitted any curtain or shutter or other device at any window of such room during the time aforesaid. And any keeper of such licensed premises or any person having a license to sell intoxicating liquors who allows or suffers any person or persons to frequent or be present in such bar-room, or room in which intoxicating liquor is trafficked in, or makes use of any device or allows any partition to exist which may preclude the public from obtaining a full view of the bar through the window of the said room during the time aforesaid, shall be guilty of an offence under this by-law. The keeper shall include the person actually contravening the provisions of this by-law, as well as the lessee or person licensed to sell liquors in any licensed premises.

“(4.) Every person, not being the occupant or a member of the family of the licensee or lodger in the house, who buys or obtains any intoxicating liquor during the time prohibited by this by-law for the sale thereof, in any place where the same is or may be sold by wholesale or retail, shall be deemed guilty of an offence under this by-law.

“(5.) Any person, not being a member of the family or household of the licensee or keeper of any licensed premises, found in the bar-rooms or rooms where intoxicating liquors are usually trafficked in during the prohibited hours aforesaid, shall be deemed guilty of an offence under this by-law.”

Duff, K.C., and *Young*, for appellants.

Barker, for respondent.

VICTORIA, B.C., July 10, 1902.

HUNTER, C.J.:—Appeal by way of case stated from the conviction of the appellant by the Police Magistrate of Nanaimo under section 5 of the Sunday Observance By-law, 1895, Nanaimo, the offence charged being that of being found in the bar-room of the Crescent Hotel between ten and twelve p.m. contrary to the provisions of the said by-law.

The by-law was passed for the purpose of regulating the hours during which houses licensed to sell intoxicating liquors should be closed. Section 2 prohibits the sale or consumption between eleven p.m. Saturday and one a.m. Monday; section 3 provides that the bar-room shall be kept closed between eleven o'clock Saturday (sic: i.e., not specifying whether it is eleven o'clock a.m. or p.m.) and one a.m. Monday; section 4 makes it an offence to purchase or obtain intoxicating liquor during the hours prohibited for sale, and section 5 an offence for any one not a member of the family, etc., to be found in the bar-room during the "prohibited hours aforesaid."

Very probably the same hours were intended to be specified in section 3 as in section 2, that is to say, the prohibited period was intended to commence from eleven o'clock p.m., but I must take the by-law as I find it, although in the view that I take it is unnecessary to consider the effect of the omission.

It was objected that there was no power in the municipality to pass a by-law closing any kind of licensed premises, except saloons, under sub-section 93 of section 104 of the Municipal Clauses Act, 1892, being sub-section 110 of section 50, Cap. 144, R.S.B.C. 1897, and I think the objection is fatal.

By section 4 of Cap. 21 of 1891, being section 7 of Cap. 124, R.S.B.C. 1897, the sale of liquor is prohibited in all places where intoxicating liquor is allowed to be sold, between the hours therein named, as also on any other days or hours during which the place is to be kept closed by order of any municipal by-law. This, I think, clearly means by any by-law which the municipality may competently enact by virtue of some statute, either general or special, but not by virtue of the section itself, which gives no such power; and this is the more apparent when we find that the Legislature had already, by the Municipal Act, 1889, section 96, sub-section 85, conferred the power on municipalities generally to order and enforce the closing of saloons, and special powers by special Acts on particular municipalities, e.g., on New Westminster, by sub-section 68 of section 142 of the New Westminster Act, 1888; and on Vancouver, by sub-section

68 of section 142 of the Vancouver Incorporation Act, 1886 (both enactments giving power to regulate), the latter being replaced by sub-section 19 of section 125 of Cap. 54, 1900, by which power is given to close saloons, hotels, stores and places of business during such hours, and on Sunday, as may be thought expedient.

In this connection it is unnecessary for me to dissent from the decision of Draper, C.J., in *In re Bright v. Toronto* (1862), 12 U.C.C.P. 433, where in upholding a similar by-law, he says in respect of the same legislation then in force in Ontario, that the by-law merely added to the provisions of the statute, and might be administered in compliance therewith. Inasmuch as he makes no reference to any other legislation authorizing municipalities to close any class of licensed premises, and I have been unable to discover any in such of the statutes of the old Province of Canada as are available, I may assume that none such existed at the time of the passage of the by-law he was considering, and therefore if he was to give full effect to the sections he could not perhaps have decided otherwise, although in this view it might be difficult to work out the clause exempting travellers.

At any rate the case is instructive as it is an illustration of the fallacy of holding that because the Courts of Ontario have ascribed a particular intention to an enactment of the Ontario Legislature, we must therefore ascribe the same intention to our own Legislature, whereas the same enactment may have been passed *alio intuitu* in British Columbia.

I therefore think that the intention of section 4 of the Act of 1891 is to prohibit the sale during (*inter alia*) such hours as the municipality may prescribe under the authority of some statute, general or special, as the case may be, in force for the time being, and that the municipality is not empowered to pass any closing by-law by the section itself.

This being so, the only closing powers in terms conferred on the Municipality of Nanaimo are those found in sub-section 93 of section 104 of the Municipal Clauses Act of 1892, still in force, i.e., the closing of saloons during such hours of the night

and on Sundays as may be thought expedient. This clearly does not give the power to close hotels, or other places of the like nature, which do not fall within the category of saloons; and I think the Legislature advisedly abstained from conferring on municipalities generally the power in relation to hotels, and in confining it to saloons. There are obviously good reasons for keeping saloons closed during Sunday, and the late hours of the night, which do not necessarily apply to hotels, as the hotel is the home or the house of the guest while he stops there, and he may be in the bar-room during such hours for perfectly legitimate social purposes, or with a view to his own comfort and convenience.

It was argued by Mr. Barker that the by-law could be upheld under sub-section 92, which confers power on the municipalities to make by-laws in relation to saloons, taverns, billiard-rooms and restaurants, but I think the short answer to this is that sub-section 92 confers general powers while sub-section 93 confers express powers to close a particular class of place singled out from those mentioned in sub-section 92. A fortiori the by-law cannot be supported under sub-section 78, which is of a more general character still, quoad hotels and saloons.

I think, therefore, that clause 3 of the by-law is ultra vires, and of course clause 5 must fall with it.

I was asked also to consider the validity of the other clauses. In my opinion, it was also incompetent for the municipality to pass clause 2, and therefore clause 4, as the subject-matter thereof is specially dealt with by the Liquor License Regulation Act, 1891, which is an automatic statute, providing penalties for its breach and the necessary machinery to enforce it, and needs no by-law to put it in force.

I may add that the cases cited to the effect that I should be slow to hold the by-law unreasonable are not in point, as the question here is not whether it is unreasonable or not, but whether the municipality had power to pass it.

In my opinion, the whole by-law is bad, and the conviction must be set aside with costs.

Appeal allowed.

[COURT OF KING'S BENCH, QUEBEC.]

CROWN SIDE.

DISTRICT OF MONTREAL.

BEFORE MR. JUSTICE HALL.

THE KING v. JOHNSTON.

Conspiracy—Attempt to defraud—Employee disclosing employer's secrets for reward—Railway company—Information of special audits on passenger trains—Proof of intent to cause financial loss to company—Indictment for conspiracy with persons unknown—Particulars disclosed by witness at trial—Instruction to jury as to recommending to mercy—Discretion—Cr. Code secs. 394, 611, 616, 617.

1. An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if neither the Crown nor the private prosecutor had definite information of the identity of the alleged co-conspirators.
2. Where at the trial of such an indictment the name of one of the alleged co-conspirators is for the first time disclosed in the testimony of a Crown witness, that information may then be added to the statement of particulars of the indictment.
3. It is a conspiracy to defraud a railway company for an employee of the audit office of the railway to agree with train conductors to sell to them secret information as to the time of special audits of passenger tickets on their trains, which information it was the duty of the accused as such employee to keep secret.
4. The system of special audits on trains being designed to prevent the railway company being defrauded by irregularities not only on the train audited but on others, and being dependent for its effectiveness on the secrecy as to the time when it will take place, the disclosure of same for reward is evidence of an attempt to cause the company a financial loss, although such disclosure tended to prevent any loss on the occasion when such audits took place.
5. It is not irregular for the judge at a trial by jury to inform the jury that if they find the prisoner guilty they may also, if they see fit, recommend the prisoner to the mercy of the Court.

DECIDED: December 10, 1902.

THE prisoner was indicted for having unlawfully conspired with persons unknown, by deceit, falsehood and other fraudulent means to defraud the Canadian Pacific Railway Company, and was found guilty. The prisoner's counsel now moved for a reserved case.

MONTREAL, December 10, 1902.

HALL, J.:—In order to detect and prevent fraud on the part of conductors, the Canadian Pacific Railway Company have adopted a system of occasional special audits of passenger trains. Two clerks in this special service board a train en route, without notice of any kind, and call upon the conductor to furnish a statement of tickets issued or passed by him, and of collections made by him. This is compared at once with the tickets actually held by the passengers in the cars, and if any discrepancy is discovered it is reported to the head officers of that service and the conductor is liable to be summarily discharged if the irregularity reported is serious or not satisfactorily accounted for. Evidence in the present trial established that while in fully nine-tenths of the cases thus specially audited no irregularities existed, a few instances had occurred in which conductors had been discharged as a result of such examination of their train accounts. The efficiency of the system depended, of course, on the absolute lack of notice or warning as to when such special audits would be made.

The accused was a clerk in the company's general audit office, but not in the special service above referred to. In August last he called at the house of one K., one of the company's staff of special train auditors, and intimated to him that a friend of his was willing to pay liberally for secret information as to when train audits were to be made, and that if he, K., would furnish the information, the payment should be divided between them. K. refused to have anything to do with the matter, but, on reflection, thought he should communicate the proposal to his superior officers, and did so. After consultation, the heads of the department requested K. to renew the negotiation with prisoner, and this was done by enclosing in an envelope addressed to him the date when a particular train was to be audited. This was repeated five or six times. The trains designated were audited and no irregularities were discovered. Prisoner paid over to K. certain sums of money from time to time, \$65 in all, which he stated was K.'s share of what he, prisoner, had received from the conductors

for the information furnished. K., at the instance of his superior officers, pressed the prisoner to give the names of the conductors who furnished the money, but this he refused to do, saying he had given his word that he would not mention their names. Detectives were employed to shadow the prisoner, and through them some corroborative evidence was secured, but none convincing as to the persons with and for whom he was acting. He was finally arrested and tried before me under the indictment above stated. His counsel applied for particulars as to the alleged offence, and these were furnished, verbally, by the Crown Prosecutor in his opening address to the jury, in which he explained the railway company's system of secret audit of trains, and of the plan suggested by prisoner to K., to obtain in advance information as to these intended audits, and of the results of the information communicated to him. The application was not afterwards formally renewed and no formal adjudication made in regard to it, as I considered that the information given was sufficient for the prisoner's defence, and that his counsel was satisfied in this respect.

In the course of the trial, evidence was adduced shewing communications by telephone and letter between prisoner and prisoner's wife and a conductor named C., in the employ of the C. P. R. Company, creating a suspicion of his complicity, but not sufficient, it was considered, to warrant any charge being made against him. Another conductor was examined, as a witness, against whom no suspicion existed, but who stated that he received private information early in September that his train was to be audited that afternoon. (This was one of the audits of which prisoner had been advised by K.) The witness was asked the name of the person who gave him the information. Prisoner's counsel objected to the disclosure of any name, inasmuch as none had been furnished in the indictment, or by the verbal statement of particulars. The witness stated that he had not previously disclosed the name, but was prepared to do so if required by the Court. I thereupon overruled the objection and ordered the witness to answer. He gave the name of Conductor C. I then re-

quired the Crown Prosecutor to add this to his statement of particulars, as being the name of one of the persons, previously unknown, with whom prisoner was alleged to have conspired. The Crown Prosecutor made the statement in accordance with my suggestion.

No evidence was adduced by prisoner, in defence. In concluding my charge to the jury, I instructed them that according to their own appreciation of the evidence they could bring in a verdict of acquittal, or one of guilty, and in the latter case, if they chose to do so by reason of any extenuating circumstances, they could add a recommendation to the clemency of the court, a modification of which they were perhaps not aware, as none of the juries of that term had availed themselves of it. The jury, after retiring and deliberating, brought in a verdict of guilty, with a strong recommendation to the mercy of the Court.

Prisoner's counsel has since moved in arrest of sentence, for a reserved case and subsidiarily for a new trial. The grounds of the motion are seventeen in number, but have been condensed by counsel into the following heads:—

(1) The Crown having known before the trial that Conductor C. was implicated with prisoner, was bound to have included his name in the indictment, and not having done so had not the right to introduce evidence connecting him with the alleged charge against the prisoner.

(2) A memorandum book and a list of the names of certain conductors having been found on the prisoner when arrested, were improperly allowed to be submitted to the jury, inasmuch as their custody in the interval had not been established and their identity was therefore improperly assumed.

(3) It was irregular and improper for the presiding judge to draw the attention of the jury to the fact that if they brought the prisoner in guilty they had the right to accompany such verdict with a recommendation to mercy; and,

(4) The evidence did not support the indictment, inasmuch as it was not proved that by communicating the evidence in regard to the auditing of trains, the prisoner defrauded or intended to defraud the railway company.

In regard to the form of the indictment in charging the prisoner with having conspired with a "person unknown," the jurisprudence permitting this form is too well established to admit of question, and, indeed, I do not understand that it is as to the form, in a legal sense, that the objection is taken, but rather that the co-conspirator having been known in advance, it was the duty of the prosecution to have furnished the name in the indictment.

Assuming the fact to be as alleged in the motion, I entirely agree with the conclusion. On a charge of conspiracy, more than any other, an accused person is entitled to know the names of those with whom he is alleged to have conspired, inasmuch as the act or statement of such co-conspirator, even done or made out of the presence of the accused, may be used as evidence against him, as soon as the offence is proved and the connection of the several parties with it. But, in the case under consideration, there was no proof, in advance, to establish the name of any person with whom the accused was conniving. There were suspicious circumstances, but not sufficient to warrant a specific charge. The evidence given at the trial was the first that furnished to the Crown or the private prosecutor the definite information as to the person with whom the accused was co-operating, or through whom he was furnishing information to the conductors. The moment that evidence was given, the prosecution, at my suggestion, announced to the prisoner that Conductor C. was one of the persons with whom he was accused of conspiring. In my opinion this was as soon as the name could have been disclosed, and the accused suffered no injury from the name not having been sooner, or having been then, disclosed.

2. A memorandum book and list of names of conductors was found on the person of the accused when arrested. Mr. Burns, the chief special agent of the railway company, who was present

at the arrest, took charge of this book and list, sealed them in an envelope, and laid them on his desk in his private room. When they were required for the trial he unsealed the envelope, found therein a similar book and list, and produced them as those taken from the prisoner, and stated that he had no doubt as to their identity, but, when pressed on cross-examination, said he could not, of course, swear that someone might not have entered his room, unsealed the envelope, substituted another book and list, and again sealed them in a similar form. The writing on the list and in the book were proved by other witnesses to be that of the accused, and I felt warranted in having the book and list submitted to the jury, with whom, of course, rested the decision of the question as to the identity of the articles in question. I cannot see that I was not entirely justified in so doing, particularly as the book and list were not in any respect of vital importance in the evidence, but corroborative only of the general charge against the accused, and of some of the statements made by the witness K.

3. As to the remark to the jury that a recommendation to mercy was always within their province when the circumstances, in their opinion, warranted it; I can entertain no doubt that it is within the discretion of the trial judge.

4. The last objection has a plausibility that at first gives it a certain amount of weight, but, upon reflection, it seems to me to be more subtle than sound. It is true that the information given by the accused that a certain train would be audited on a certain day had the effect of preventing the railway company from being defrauded at that time and on that train, but the adoption of this system was to prevent irregularities, not on the train audited, but on the others, and its effectiveness depended entirely on the secrecy as to the time when it would take place. The information sought by the accused and communicated by him to the conductor whose train was to be audited, thwarted and destroyed the object the company had in view, and this corrupt interference on his part and betrayal of his employer's secrets constituted, in my

opinion an attempt to cause them a financial injury, and thereby to defraud them within the sense and meaning of the words of the indictment. The motion is therefore dismissed.

Motion dismissed.

N.B.—The prisoner was thereupon sentenced to two years' imprisonment.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE GRAHAM, E.J., IN CHAMBERS.

BEFORE TOWNSHEND, J., IN CHAMBERS.

THE KING v. HAWES.

Common assault—Limit of punishment upon summary trial—City stipendiary magistrate—Extended jurisdiction of Court of General Sessions—Imprisonment in default of paying fine limited to three months—Cr. Code secs. 265, 785, 872.

1. *Per* GRAHAM E.J.—A city stipendiary magistrate holding a summary trial under Code sec. 785 may impose imprisonment not exceeding one year for common assault although Code section 265 specifies such punishment with the addition of the words "if convicted upon an indictment."
2. *Per* GRAHAM, E.J.—Section 785 gives to police and stipendiary magistrates of towns and cities the power to award on summary trials held with the consent of the accused, the same punishment as an Ontario Court of General Sessions might impose on a trial on indictment.
3. *Per* TOWNSHEND, J.—Upon a summary trial for common assault, the imprisonment authorized by Code section 265 can only be imposed in the first instance; and where a fine is imposed the imprisonment in default of payment thereof is controlled by Code sec. 872 (*b*) and is therefore limited to three months.

ARGUED: September 15th and 20th, 1902.

DECIDED: September 15th and 20th, 1902.

THIS was an application under chapter 181 of the Revised Statutes of Nova Scotia, "The Liberty of the Subject Act," for the discharge from custody of the above-named defendant, who was confined in the city prison at Halifax under a warrant of commitment made by George H. Fielding, Esquire, Stipendiary Magistrate in and for the City of Halifax.

The warrant of commitment recited a conviction which alleged that "the said Freeman Hawes having been charged be-

fore me with a violation of section 241, Criminal Code of Canada, and having consented, etc.," was found guilty of a common assault on the person of George Jones, and for which he was adjudged to pay a fine of fifty dollars, or in default to be imprisoned in the said city prison for the term of five months, unless the said fine were sooner paid. It was admitted that the defendant was tried under Part LV. of the Code, section 785, with his own consent.

HALIFAX, September 15th, 1902.

W. J. O'Hearn, for the prisoner: The punishment imposed in this case can only be awarded when the offender was tried on an indictment. See section 265 of the Code. The language of section 265 is mandatory, and the only way, apart from a summary conviction, that the punishment provided by it can be awarded is by following its provisions, namely, by indictment. The section is most specific in this regard, as other sections of the Code merely mention the offender as "guilty of an indictable offence," etc., and do not point out the particular mode of trial. Defendant being convicted under Part LV. of the Code, the conviction is not the same as a conviction on indictment, notwithstanding the statute. *R. v. St. Clair*, 3 Can. Cr. Cas. 551. The finding of an indictment is by a Grand Jury, a proceeding which is not provided for under Part LV. of the Code.

Andrew Cluney, for the Attorney-General of Nova Scotia, contra: The words "if convicted on indictment" are only used to distinguish the proceeding from the summary conviction part of section 265. A magistrate under section 785 of the Code can punish the same as the sessions in Ontario. The sessions in Ontario punish on indictment.

HALIFAX, September 15, 1902.

GRAHAM, E.J., delivered an oral judgment, refusing the application on the ground that section 785 of the Code gives the police magistrate the same power to punish as the Judge of Sessions in Ontario, who tries on indictment.

The application was renewed before TOWNSHEND, J., on September 20th, 1902.

O'Hearn, for the prisoner, renewed the point taken before Graham, E.J., but the learned Judge now hearing the application refused to consider that point, as it had been passed upon by Graham, E.J.

O'Hearn, for the prisoner, continued: Section 265 of the Code provides two substantive punishments. The section is drafted similarly to sections 208 and 501 of the Code. These sections provide substantive punishments. See *R. v. Horton* (1897), 3 Can. Cr. Cas. 84; 31 N.S.R. 217; and *R. v. Stafford*, 1 Can. Cr. Cas. 239. The present conviction provides the punishment in default of payment of the fine, which is not permitted by section 265.

Lenoir, for the Attorney-General of Nova Scotia: If the defendant's contention is correct, the statute has not provided any punishment in default of payment of the fine. Section 808 of the Code forbids the application of section 872 to a prosecution under section 785. Section 958 controls the punishing powers of the magistrate in this case.

O'Hearn, in reply: The statute has provided for such cases by sections 951 and 929 of the Code.

HALIFAX, September 20th, 1902.

TOWNSHEND, J., delivered an oral judgment at the close of the argument, granting the discharge of the defendant on the usual terms that he bring no action, holding that under section 265 of the Code only fine or imprisonment can be imposed in the first instance. Section 872 (b) of the Code provides the means of working out the fine, but restricts imprisonment to three months, in default of payment of the fine. Here there was a clear excess of jurisdiction, as five months were imposed.

Prisoner discharged.

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDER LACOSTE, C.J., BOSSÉ, BLANCHET, HALL
AND WURTELE, J.J.

DREW v. THE KING.

Perjury—False oath made before de facto legal tribunal—Magistrate incompetent under special statute under which charge is laid—Cr. Code secs. 145, 616.

1. It is perjury under sec. 145 of the Criminal Code to give false testimony before a justice of the peace holding a judicial proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place.

DECIDED: October 25, 1902.

Reserved case granted by the Court of King's Bench, sitting in appeal.

The appellant Drew charged one Rowe with having committed a trespass by forcible entry on his land. The charge was apparently laid under the Agricultural Act (Que.) which restricts the hearing of such cases to a Magistrate residing in the county where the offence was committed. The case was tried before the Recorder at Valleyfield, who was not a resident of the county in which the offence was committed, but was vested ex officio with the power of two magistrates throughout the whole district in which the county is situated. The appellant being convicted in the Criminal Court, of perjury, for false statements made in his deposition as a witness, the question was reserved whether the technical objection to the competency of the Recorder to sit in the case of trespass prevented the commission of the legal offence of perjury.

Section 145 of the Criminal Code defines the offence of perjury in the following terms:—

16—C.C.C. '03.

"145. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open Court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the Court, jury, or person holding the proceeding. Evidence in this section includes evidence given on the voir dire and evidence given before a grand jury.

2. Every person is a witness within the meaning of this section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.

3. Every proceeding is judicial within the meaning of this section which is held in or under the authority of any Court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly or House of Assembly or any committee thereof, empowered by law to administer an oath, or before any justice of the peace, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a Court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such Court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

MONTREAL, October 25, 1902.

HALL, J., delivered the judgment of the majority of the Court as follows:—

The petitioner has been granted a reserved case from a conviction against him for perjury under the following circumstances. He made a written complaint under oath before the Recorder at Valleyfield accusing one Rowe of having committed a trespass by forcing an entrance upon the complainant's land in the township of Franklin, in the county of Huntingdon.

In his defence Rowe put in issue the jurisdiction of the Magistrate, upon the ground that under the Agricultural Act a charge of trespass could only be heard by a justice of the peace residing in the county in which the alleged offence took place.

It was admitted that under this provision the Recorder of Valleyfield, although possessed, *ex officio*, of the power of two Magistrates throughout the whole district of Beauharnois, would be technically disqualified, but the Recorder came to the conclusion, wrongly I think, that the charge might be maintained under the common law, under which there could be no doubt as to his jurisdiction. Rowe was, therefore, obliged to enter upon his defence upon the merits of the charge, and in support of it Drew, the present petitioner, again presented himself as a witness and made a sworn deposition repeating the allegations of his complaint. The other testimony adduced in the case clearly established that both these sworn statements were untrue, and the charge against Rowe was thereupon dismissed.

The present proceedings were then instituted, charging Drew with perjury. He was tried before Mr. Justice Bélanger and a jury at the criminal term at Beauharnois, found guilty and sentenced to two years' imprisonment. He applied at once to the Court for a reserved case and to have the conviction quashed upon the ground that, inasmuch as the Recorder of Valleyfield

had no legal jurisdiction to hear the original complaint, the sworn statements made before him—even if untrue—could not form the legal basis of a charge of perjury. Although a majority of the Court was under the impression at the time of the application that the point was not well taken, we decided to grant a reserved case, so that a second argument might take place upon the question, and that we might have more time for its consideration.

The whole issue can be presented in a very few words. Accepting the verdict of the jury as a correct finding upon the *facts*, the petitioner is guilty of having made a false statement under oath in a proceeding instituted by himself and before a Magistrate of his own selection. On the other hand, the complaint having alleged that the trespass was committed in the county of Huntingdon *against the form of the statute*, it must be inferred that the *statute* in question was the Agricultural Act, which restricted the hearing of such charges as the present to a Magistrate residing in the county where the offence took place, and the Recorder of Valleyfield therefore had no legal jurisdiction to hear and decide the case. Under these circumstances, can the petitioner be legally convicted of perjury?

All who had experience in former years in prosecutions before our criminal Courts are aware of the serious technical difficulties which made convictions of perjury almost impossible. The common law of England, which was in force here in criminal matters, exacted that the alleged false evidence must have been *material* to the issue in the case in which it was taken, and, secondly, that the tribunal before which the sworn statement was made must have been regularly constituted and have possessed competent jurisdiction to hear and adjudicate upon the case. So that if a false statement were made by a witness, he could not be punished for it unless it related to the exact issue which was under consideration, and, equally, if having thus sworn falsely, he could, upon his trial for perjury, establish that the Magistrate had not taken the oath of allegiance, or lacked the proper qualification, or did not possess the technical

jurisdiction, territorial or otherwise, to try the case, the witness guilty of an attempt to mislead justice by false evidence escaped conviction and punishment. This was admitted to be a cause of a serious miscarriage of justice, and a persistent effort was made to correct both abuses. The first suggestion made was to abolish *materiality* as an essential condition of a conviction for perjury. Our Parliament at once accepted the modification and, by 32-33 Vict. (1869), ch. 23, sec. 7, declared that any false statement made by a witness in a judicial proceeding should be held to be *material* to the issue then pending. This removed a part of the difficulty, but the other remained, and still exists and hampers the administration of criminal justice in Great Britain. So many similar abuses existed there that in 1880 an Imperial Commission was appointed, headed by Sir James Stephen, the eminent expert in criminal law, to examine the whole body of English criminal law and report upon the changes that seemed to them necessary and desirable. Their report was voluminous and exhaustive. In regard to the offence of perjury they recommended that materiality should not be insisted upon as an essential condition for conviction. In regard to the existing conditions as to the technical constitution of the Courts and the qualifications of the Magistrate, they recommended very radical changes, nothing less in fact, than the abolition of all the class of objections which made convictions so difficult. They reported that in their opinion: "The guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal de facto exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can shew some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves." They recommended, therefore, that a statute should be passed declaring perjury to be "a false assertion as to a matter of fact made by a witness in a judicial proceeding, whether such evidence is material or not,

and that every proceeding should be declared to be judicial so as to warrant a conviction for perjury, provided it had been held:—

1. Under the authority of any Court of justice; or
2. Before any justice of the peace; or
3. Before any person authorized by law to take evidence under oath; or
4. Before any legal tribunal by which any legal right can be established; or
5. Before any person acting as a Court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such Court or person, so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place, *or was otherwise invalid.*”

A bill was introduced in the English Parliament to give effect to these recommendations, but in the pressure of other work and in consequence of the slowness of the English people to effect changes even in the way of improvement, the bill has not yet passed the committee stage. Our Parliament, however, recognizing the benefits to be derived from the commissioners' work, availed itself of the first opportunity to give effect to their recommendations. Our whole criminal law was consolidated and codified in 1892, and almost every change suggested by the Imperial Commission was adopted. That in regard to the offence of perjury was adopted without the change of a word, and Article 145 of our Criminal Code of 1892 is the reproduction of the definition I have quoted above, both as to the offence itself and the term “*judicial proceeding.*”

It seems to a majority of this Court that the intention of that commission as expressed in their report and the natural interpretation of the definition they recommended and which our Parliament adopted are these: that any false statement made under oath by a witness in the presence of Justice is perjury: it is a violation of the solemnity surrounding a legal tribunal; it is an attempt to mislead Justice, and it is not desirable,

to use the commissioners' words, "that a person who has done this should escape from punishment if he can shew some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves."

We admit that the point raised in this case would probably be fatal under the law of England to-day, because their law has not yet been changed, and authorities cited from that law have therefore no relevancy. We admit that the technical objection now raised would have been fatal under our law as it stood before 1892, but the very object of the change in the law in that year was to prevent a miscarriage of justice in such a case as this. It seems to us that words could hardly be more comprehensive than those used. The proceeding shall be held to be *judicial* so as to cover the charge of perjury if it had been made before any person acting as a Court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such Court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place, *or was otherwise invalid.*" It seems to us, in the light of the expressed intention of the commissioners to make false swearing punishable if made before any *de facto* tribunal, even if not legally constituted, that these last words, "or was otherwise invalid," leave no loop-hole for escape if the offence has been committed before any person or tribunal whom the witness believed at the time had power to administer the oath and prosecute the enquiry. If it be not so, and if the present petitioner can, by his interpretation, escape the punishment for the offence of which he has been convicted, it follows of course that equal immunity would follow the commission of a similar offence in proceedings before a Judge of the Superior Court, whom a Court of appeal might afterwards declare to have had no jurisdiction, or before a committee of the House of Commons, when it was afterwards decided that the House had exceeded its powers in the appointment of such committee.

An oath is not necessarily illegal because it is taken before a person who has not at the moment a technical qualification for receiving it. The Canada Evidence Act (1893), section 22, enacts that "every Court and Judge and every person having by law or consent of parties [an arbitrator, for example] authority to hear and receive evidence shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge or person."

A false oath, therefore, before an arbitrator mutually agreed upon by the parties would clearly subject the party guilty of making it to conviction and punishment for perjury, and we cannot bring ourselves to think that a similar false statement made under oath before a duly appointed justice of the peace by the person who invoked the intervention of such Magistrate, cannot be the basis of a legal charge of perjury. In the valuable work upon our criminal law published by Mr. Justice (now Sir Elzear) Taschereau, to which we naturally look for instruction in such a case as the present, the first two editions (before the Code) commented upon and approved the change made by 32-33 Vict. ch. 23, sec. 7, in doing away with the element of materiality as essential in a prosecution and conviction for perjury, but the last edition, published since the Code, makes no additional comment upon the change effected by sub-sections 3 and 4 of Art. 145 of that Code, which also removed the other ground of difficulty in securing convictions for that offence, viz., proof as to the legal constitution and qualification of the tribunal before which the oath was made. We are deprived, therefore, of the benefit we might have received on this subject by an expression of the views of that eminent jurist.

The majority of the Court is of opinion that the conviction is legal, and that the petition to quash it must be dismissed.

WURTELE, J. (dissenting):—In this case, I find that I have to dissent from the opinion and judgment of the majority of the Court, and the notes which I am about to read will give my view of the law as regards the questions submitted.

The appellant, Albert Victor Drew, was convicted on the 10th day of April, 1902, in the Court of King's Bench, at Beauharnois, of perjury, and he has appealed, and asks that the verdict be quashed as being contrary to the provisions of the law respecting perjury, and that he be discharged. His application for a reserved case was refused, but leave to appeal from the trial Judge's decision was granted, and he has stated a case for the opinion of the Court of Appeal on the question of law raised by the appellants.

The appellant has been for some years the owner of a lot of land in the township of Franklin, in the district of Beauharnois, being the south half of lot No. 5 of the 8th range of Jamestown. The municipal council of the township established a water course over several lots of land in the township, including the appellant's property; he was opposed to the work and instituted an action to attain the annulment of the *procès-verbal*. The municipal council delegated the private prosecutor, Benjamin J. Rowe, and six other persons, to examine the water course, to enable them to give evidence in the suit between the appellant and the municipal corporation, which was then pending. On the 14th day of August, 1901, the persons who had been appointed by the municipal council proceeded to visit and examine the water course, but the appellant forbade them from entering on his land; the private prosecutor, Mr. Rowe, and two others did not go on it. On the 19th day of August, 1901, the appellant laid an information, under oath, before L. J. Papineau, the Recorder of the town of Salaberry of Valleyfield, in that town, against Mr. Rowe, the private prosecutor, charging him with having entered upon his land without his permission on the 14th day of August, 1901, of having trespassed on his land contrary to the form and tenor of the statute for such case made and provided. The information was not laid under the common law, but under the provisions of article 5551 of the Revised Statutes of Quebec. Then at the trial of the case, which was so brought against the private prosecutor Mr. Rowe, the appellant, on the 29th day of August, 1901, swore before

the Recorder of the town of Salaberry of Valleyfield that the private prosecutor, Mr. Rowe, had committed the trespass on his land. It was, however, proved that the private prosecutor, Mr. Rowe, had really not entered on the appellant's land and had not committed the trespass of which he was accused by the appellant, and the suit against him was dismissed.

At the ensuing term of the Court of King's Bench, in the district of Beauharnois, an indictment for perjury was preferred against the appellant, a true bill was found, and on the 10th day of April, 1902, he was found guilty.

On the 14th day of April last, the appellant raised the question of law that the Recorder of the town of Salaberry of Valleyfield had no jurisdiction over the subject matter and therefore that he could not be legally held to have committed perjury, and he moved that the question should be reserved for the opinion of the Court of Appeal, but on the 19th day of the same month, his application was refused. As has already been stated, leave to appeal from the trial judge's decision was granted on the 21st day of May last, and the trial judge, the Hon. Mr. Justice Bélanger, has stated a case and has transmitted it to the Court of Appeal.

The question submitted for the opinion of the Court of Appeal is whether the Recorder of the town of Salaberry of Valleyfield had competent jurisdiction to deal with the offence of which the private prosecutor, Mr. Rowe, was accused, and had lawful authority to administer the oath on which the information was laid, and the oath on which the appellant's testimony was given at the trial, and whether under the circumstances the appellant legally committed perjury.

The contention of the appellant is that the statutory offence of trespass enacted by article 5551 of the Revised Statutes of Quebec is only triable by a special tribunal composed of one or more justices of the peace of the district, who reside in the county in which the offence has been committed, and that such justices of the peace alone can take cognizance of his offence; that while the Recorder of the town of Salaberry of Valleyfield

is *ex officio* a justice of the peace for the district of Beauharnois, he does not reside in the county of Huntingdon, and had no competent jurisdiction and power to take cognizance of the complaint; that he had no authority to receive the oath upon which the information was laid or the oath on which the appellant gave his testimony at the trial; and therefore that legally the latter did not commit perjury.

The contention of the private prosecutor, Mr. Rowe, is that the Recorder of the town of Salaberry of Valleyfield as a justice of the peace *ex officio* in and for the district of Beauharnois, with all the power and authority of one or two justices of the peace, had competent jurisdiction to take cognizance of the prosecution against him for trespass, and that in swearing falsely, as the appellant did in laying the information, and at the trial, he consequently committed perjury, and moreover, that under section 145 of the Criminal Code, it sufficed to constitute the crime of perjury that the false assertion was made upon an oath taken before any legal tribunal or before any justice having power to hold a judicial proceeding of the nature of the one in which the oath was received, whether duly constituted or not and whether the proceeding was duly instituted or not.

There is a difference between perjury in a legal sense and perjury from a religious and moral point of view. Every false assertion made under the solemnity and sanction of an oath is perjury in a religious and moral point of view, but every such false assertion does not constitute perjury in a legal sense; to constitute legal perjury it is necessary that the oath should have been administered by a person authorized by law to do so.

Section 145 of the Criminal Code defines perjury to be an assertion as to a matter of fact in a judicial proceeding upon oath, whether by evidence given in open court or by affidavit or otherwise, which is known by the person making it to be false and is intended by him to mislead the court or person holding the proceeding. Then the section provides that every proceeding is judicial within the meaning of the enactment which is held before any tribunal by which any legal liability can be estab-

lished, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceedings, whether duly instituted or not, and whether the proceeding was duly instituted or not before such Court or person so as to authorize it or him to hold the proceeding.

It appears, therefore, to me from the provisions of this section that to constitute perjury the oath must have been administered and that the false assertion must have been made in a judicial proceeding, and that such proceeding must have been brought, taken and held before a Court or justice of the peace having power, authority and jurisdiction to take cognizance of the cause of complaint. This seems to me to be clearly shewn by the words of the enactment which are that perjury is a false assertion intentionally made in a judicial proceeding, and that within the meaning of the enacting section—that is, to constitute perjury,—the proceeding must be held before a legal tribunal by which any legal liability can be established, or before any person acting as a tribunal or justice having power to hold the proceeding. To constitute perjury the oath upon which the false assertion is made must be administered in a proceeding which the tribunal or justice had competent jurisdiction and authority to entertain, or to consider and determine; if the tribunal of justice had competent jurisdiction the false assertion constitutes the legal and statutory crime of perjury, and if it or he had no competent jurisdiction the false assertion is only a moral offence which is not punishable under the provisions of the Criminal Code.

Section 22 of "The Canada Evidence Act, 1893," enacts that every court and judge, and every person, having by law or consent of parties authority to hear and receive evidence shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. Under this enactment a court, a judge or a justice of the peace can only legally administer an oath to a witness or litigant when it or he has authority to hear and receive evidence in the judicial proceeding which has been instituted, and such authority can only exist when the court, the judge or the justice of the peace has

competent jurisdiction over the matter or subject of complaint. To constitute legal perjury, I, therefore, hold that a legal oath must have been administered, as such oath alone has legal force and effect; so when the oath is not authorized the act of taking it is in law an idle and vain ceremony. I may here quote the words of Russell, in vol. I., p. 297, of his work on Crimes: "No oaths whatever taken before . . . those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, can ever amount to perjury, because they are of no manner of force, but are altogether idle."

Then, again, section 616 of the Criminal Code provides that no count charging perjury shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath was taken; and this, to my mind, denotes that to constitute perjury in laying an information or in giving testimony upon oath, the tribunal must have had authority to administer the oath, and, therefore, have had competent jurisdiction over the cause of complaint. I may summarize this provision by saying that while it must appear with certainty in the indictment, that the person administering the oath had jurisdiction and consequently authority to do so, it is not necessary to set forth the facts giving the jurisdiction and authority.

The principle that the false assertion must be made in a proceeding before a court of justice having competent jurisdiction over the subject or matter complained of is found in all the law books which treat of perjury. I will cite a few of them:—

Gibson and Weldon, Criminal and Magisterial Law, p. 114.

The court which administers the oath must be one of competent jurisdiction, and it must have lawful authority to administer the oath.

Warburton, Leading Cases in the Criminal Law, p. 60. To constitute the crime of perjury, it is necessary that . . . the swearing should be in a judicial proceeding and before a competent jurisdiction. If it turns out, at the trial, that the

oath was taken before a person who had no lawful authority to administer it, or who had no jurisdiction of the cause, the defendant must be acquitted.

2 Bishop, Criminal Law, No. 1020. The oath must be administered by one having legal authority; otherwise there is no perjury in false testimony given under it. The cause must be one of which the tribunal or magistrate has jurisdiction.

Taschereau, Commentaries on the Criminal Code, p. 88. The oath must be taken before a competent jurisdiction or before an officer who had legal jurisdiction to administer the particular oath in question.

Bouvier's Law Dictionary, verbo, Perjury. The person by whom the oath is administered must have competent authority to receive it; an oath, therefore, taken before an officer having no jurisdiction will not amount to perjury, for where the court has no authority to hold plea of the cause, but it is *coram non judice*, there perjury cannot be committed.

I will also quote the case of *McAdam v Weaver*, from 2 Kerr's New Brunswick Reports, p. 178, in which Carter, J., on the 15th June, 1843, said: It is clear that the party who administers the oath must not only have jurisdiction over the matter in relation to which the oath is taken, but he must be exercising his jurisdiction at the time; and, Chipman, C.J., said: The proceeding before the justices was for a penalty and they, at the time the oath was administered, were exercising a jurisdiction which they had no power to exercise; they had no jurisdiction to try and determine; the proceeding was, therefore, *coram non judice*, and the action cannot be maintained.

The private prosecutor, Mr. Rowe, however, contends that the Criminal Code has made a change in the law, and that in consequence of the addition in section 145, after the phrase: "Before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such legal proceeding" of the words, "whether duly constituted or not, and whether the proceeding was duly instituted or not," it is immaterial

whether the court or justice had or had not competent jurisdiction over the cause or proceeding brought before it or him in which the false swearing occurred.

We have to see whether this contention is well founded and whether the addition of the words in question has changed the law to the effect contended:—that perjury may be committed whether the court or justice had or had not competent jurisdiction to entertain, hear and determine the cause or proceeding in which the false swearing took place.

Many of the changes in our criminal law which are contained in the Criminal Code are taken from the English draft code which was prepared in 1880, by a royal commission, and the draft code, gave, as was stated by the late Sir John Thompson, in the House of Commons, immense help to the Parliament of our country in simplifying our law relating to criminal matters and criminal procedure and in reducing it into a code. The addition of the words which I have just mentioned made in section 145 of our Criminal Code, relating to perjury, is one of the amendments which were suggested by the Royal Commission, and in order to seize its legal sense we cannot do better than to refer to what the commissioners said with reference to their suggestion of the addition. A question had been raised as to whether a person could be found guilty of perjury when the offence had been committed before a court having competent jurisdiction, but when the offence was irregularly brought before it, and doubts had been raised whether perjury could be committed before a court which was defectively constituted, but which had otherwise competent jurisdiction over the cause, or before a court or a justice *de facto* exercising judicial functions and having as such competent jurisdiction over the proceeding held by it or him. In the case of *The Queen v. Hughes*, (14 Cox, p. 284, and 4 Q.B.D., p. 614), the court for Crown cases reserved maintained a conviction for perjury where the court before which the false swearing had taken place had competent jurisdiction over the case, but where it was contended that the case had been improperly brought before it. Gibson and Wel-

don, p. 114, refer shortly to this decision and say: "If the court has jurisdiction to deal with the offence, it is no defence to an indictment for perjury committed before it, that the case was irregularly brought before it." In the case of *The Queen v. Castro*, L.R., 9 Q.B., p. 356, Blackburn, J., on the 29th April, 1874, said: "We should be most reluctant to give any countenance to the notion that on a trial before one of the judges of the superior courts who has general jurisdiction over the subject, a witness might commit perjury with impunity on account of any defect or irregularity in the proceedings, especially when, as in this case, the irregularity, if it were one, was waived by the parties, who, though they cannot by consent give jurisdiction, can waive an irregularity."

The commissioners framed an article representing the law of perjury as it then existed, but, in order to confirm the jurisprudence established and to quiet all doubts on these points by a legislative enactment, they suggested the addition or amendment in question. Mr. Justice Taschereau, in his commentaries on the Criminal Code, states that the words so added settle doubts which have been raised.

Our Parliament adopted the article as framed by the commissioners, as section 145 of the Criminal Code, as the definition of perjury in place of the definition contained in section 2 of the Act respecting perjury, being chapter 154 of the Revised Statutes of Canada, and as embodying the law on the subject then existing, but with the amendment suggested by the commissioners. The definition, however, contained in the section of the Criminal Code, without the amendment, and that contained in the section of the act respecting perjury, are the same in effect. Here is what the commissioners say in their report respecting the article framed by them, and the amendment suggested: "In framing the above section we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can

"show some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves."

It is plain, to my mind, that the amendment does not change the essential principle that to constitute legal perjury the oath must be taken and the false swearing must have occurred in a judicial proceeding before a court or a justice of competent jurisdiction; and that the amendment only provides that when the court or the justice has jurisdiction to deal with the case, it is no defence in a prosecution for perjury that the court was not properly constituted, or that the case was irregularly brought before the court or a justice, or that the court or justice was only a court or a justice, *de facto*, although exercising as such the judicial functions of a court or of a justice which or who really had competent jurisdiction over the cause.

All oaths were formerly judicial, which had to be authorized by law, or were extra-judicial, which were not authorized by law; in the first case, the oath amounted to perjury, but in the second case it did not. To constitute perjury the oath had to be administered in a judicial proceeding by a tribunal or officer having authority or jurisdiction over the subject matter of the proceeding; the oath was then judicial, but otherwise it was extra-judicial, and it could not be made the foundation of an indictment for perjury. (Am. and Eng. Encyc. of Law, *vbo.* Perjury, paragraph 11). But false swearing is making a false declaration on oath which, while not within any common law designation of perjury, has been declared by statute to constitute perjury, and made indictable in certain cases. For instance, sec. 147 and sec. 148 of the Criminal Code enact that if any one who is required, authorized or permitted to make a statement on oath, makes a false statement, which, if made in a judicial proceeding, would amount to perjury, he is guilty of perjury. To make a false solemn declaration is also constituted perjury by the statutory provisions of the Criminal Code, although it be not made in a judicial proceeding.

Perjury at common law only existed when a witness gave false testimony upon oath in a judicial proceeding before a court of competent jurisdiction, (*R. v Townsend*, (10 Cox, C. C., p. 356), while by statute law it is likewise, in its unenlarged sense, a false oath knowingly, wilfully and corruptly given by one in some judicial proceeding before a competent jurisdiction. Perjury at common law and by statute law in its unenlarged sense, is the same in effect; but the statute law has also, as I have just stated, made a false oath perjury, where on other occasions an oath is imposed, required, authorized or permitted by law. To amount to perjury, however, the oath must be administered in such cases by a Judge or a functionary duly authorized to do so by law, and having therefore competent jurisdiction; and under section 153 of the Criminal Code all persons who administer an oath without authority or jurisdiction by some law in force, are liable to a fine or to imprisonment.

Now what is the effect of the amendment made by Parliament in section 145 when the Criminal Code was adopted? Did it alter the principle of the common law and that of the statutory law which then existed, viz.: that the false swearing had to take place before a court or a justice of the peace with competent jurisdiction? It is a fundamental rule that statutes have to be expounded with reference to the principles of the common law and of the existing statutory law, and the legislative intent is not presumed to have been to make any innovation further than necessity required. It requires a distinct and positive legislative enactment to alter any clearly established principle of law; and statutes are not presumed to make any alteration in the common law or the existing statutory law further or otherwise that the Act does expressly declare. The words of an Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to these words consistently with the intention of preserving the existing policy untouched. It is presumed that the Legislature does not intend to go against the ordinary rules of law, to create a new and extended liability. Where, however, the pro-

visions of a statute are in direct conflict with any principle of the common law or of the existing statutory law and effect cannot be given to the statute unless it is to prevail over the common law or the existing statutory law, it must be presumed that Parliament resolved to leap over and waive the rules of law and to make a particular law for the case. (Am. & Eng. Ency. of Law, *vbo.* Common Law, par. 2; Harcastle on Statutory Law, pp. 138 and 208; Wilberforce on Statute Law, p. 20.) I have explained the reason for which the amendment to the statutory law respecting perjury was made, what abuse it was the intention of the Legislature to remedy, and it certainly cannot be inferred or presumed, to my mind, that it was intended to change the ordinary rule of the law of perjury, that the oath had to be administered and that the false swearing had to take place before a Court or justice of the peace have competent jurisdiction over the cause or complaint. In fact, the words of the amendment appear to me to be consistent with the intention of making no change in that respect and to have a perfect sense and meaning without any change of the previous rule or principle.

In the present case, we have to deal with oaths alleged to have been administered in a judicial proceeding, and whether we apply the common law or the statute law, the Recorder of the town of Salaberry of Valleyfield in his capacity of an *ex officio* justice of the peace, had to possess competent jurisdiction over the cause of complaint and authority to entertain, hear and determine the case, to administer them.

Now, only one other point has to be examined; it is whether the Recorder of the town of Salaberry of Valleyfield had competent jurisdiction to entertain, hear and determine the cause.

By section 410 of the charter of the town of Salaberry of Valleyfield (57 Vict., ch. 63, Q.) the Recorder is constituted *ex officio* a justice of the peace in and for the district of Beauharnois, and is vested with all the rights, powers and authority of one or two justices of the peace. As such justice of the peace

he has the same jurisdiction as the ordinary justices of the peace in and for the district, and no more powers, rights and authority than they have, except that he can act alone in all cases and proceedings which require the joint action of two justices of the peace.

The statutory offence of trespass, that is the act of entering upon or passing over the land of any person without his permission, is created by article 5551 of the Revised Statutes of Quebec, and it is provided by article 5561 that all actions and proceedings for the offence of trespass and for other offences contained in the section which enacts the provisions respecting trespass, should be brought and taken before one or ^{more} justices of the peace, but that such justices of the peace ^{would} only have jurisdiction when they reside in the county in ^{which} the offence has been committed. The lot of land of the appellant on which he alleged that the private prosecutor, Mr. Rowe, had trespassed, is in the county of Huntingdon, and the Recorder, Mr. Papineau, does not reside in that county, but resides and resided, when the information was laid before him, and when the private prosecutor, Mr. Rowe's trial took place, in the county of Beauharnois. He, therefore, had no competent jurisdiction to receive the information or to administer the oath upon which it was founded, nor to deal in any way with the cause. In support of this principle I may refer to a passage in the first volume of Russell on Crimes, p. 305: "Under the 7 and 8 Vict., ch. 101, section 2, an application for an order in bastardy is to be made to the justices acting for the petty sessional division in which the mother may reside; and they have no jurisdiction to entertain such an application unless she does reside within their division, and, consequently, if she does not so reside, perjury cannot be committed on such an application."

It was urged, however, that at all events, the Recorder as an ex officio justice of the peace had jurisdiction and authority to entertain a prosecution for a trespass under the common law, but a reference to the information shows that it was not

laid for a common law trespass but for the statutory one enacted by article 5551 of the Revised Statutes of Quebec, as it concludes by stating that the trespass complained of was contrary to the form of the statute in such case made and provided. Consequently the Recorder as an *ex officio* justice of the peace was not called upon to entertain a case founded upon a trespass under the common law, and he had no competent jurisdiction to deal with a trespass under the statute law.

The trial judge in the case which he has stated for the opinion of the Court of Appeal declares that it was established in evidence that the defendant had sworn falsely in the information, and had given false testimony at the trial, but that it was also proved that the appellant's land on which the trespass was alleged to have been committed was situated in the county of Huntingdon, that there were justices of the peace who resided in that county at the time when the trespass was said to have been committed, and when the proceedings took place before the Recorder, and that the Recorder Mr. Papineau, resided in the town of Salaberry of Valleyfield, in the county of Beauharnois.

The private prosecutor, Mr. Rowe, alleges, among other things, that when the Recorder received the information and presided at the trial he had nothing before him to show that the township of Franklin was in the county of Huntingdon; he evidently forgot that Judges are bound to take judicial notice of the territorial divisions of the province and of all acts of the Provincial Legislature, and that article 64 of the Revised Statutes of Quebec, which defines the electoral districts of the province, in paragraph 21 states that the township of Franklin is comprised in the county of Huntingdon.

On the whole I am of opinion that the Recorder of Salaberry of Valleyfield had, in his capacity of an *ex officio* justice of the peace in and for the district of Beauharnois, no competent jurisdiction to deal with the statutory offence of trespass of which the private prosecutor, Mr. Rowe, was accused, and had no lawful authority to administer the oath on which the information was laid, and the oath on which the appellant's

testimony was given at the trial; and that although the defendant was guilty of the moral offence of perjury by taking an oath which was binding on his conscience and by swearing falsely, he did not commit the legal offence of perjury, that he should have been acquitted, and that the verdict and sentence should be quashed. But the majority of the Court is against this view of the case, and is of opinion that the verdict and sentence should be confirmed.

Mr. Justice Blanchet concurs with me, and also dissents from the opinion and judgment of the majority of the court.

BLANCHET, J. (dissenting):—I have also come to the conclusion that the verdict ought to be quashed.

It seems to me that the last five lines of paragraph 3 of section 145 of the Criminal Code are to be read separately and independently from the first part of the clause, and that the words "duly constituted or not" referring, as they do, to "any person acting as a Court, justice or tribunal" cannot be construed as meaning "whether the person so acting has jurisdiction or not," because the words immediately preceding, expressly require that such person must have "power to hold such judicial proceeding," which is tantamount to declaring that jurisdiction must exist.

It is, therefore evident, to my mind, that the only logical interpretation of the words "duly constituted or not," is that they are intended to cover mere irregularities and technicalities, or, as stated by the English Commissioners, some defect in the constitution of the tribunal.

I have no doubt that if it had been the will of Parliament to depart, in this particular respect, from the old principle of the English law which is maintained throughout the Code, its intention would have been expressed in clear and unmistakable terms.

The judgment of the Court was recorded in the following terms:—

“It is considered and adjudged, and finally determined by the Court now here, pursuant to the provisions of the Criminal Code in that behalf, that an entry be made in the record to the effect that in the opinion of this Court, the proceedings had or taken in the said Court at Beauharnois are regular and sufficient; that the affidavit and deposition of the petitioner, which have been proved to be false, were made voluntarily by said petitioner before the Recorder of Valleyfield, an *ex officio* justice of the peace, not only without objection or protest on his behalf, but that said sworn statements were made before a tribunal of his own selection, and that the objection now made in regard to the lack of jurisdiction of said Magistrate to hear the case thus submitted to him by said petitioner is not one which, under the law of perjury now in force here, can avail to said petitioner to secure the quashing of the verdict and sentence rendered against him, and therefore that no reasons have been assigned by and on behalf of the accused sufficient to set aside the verdict and sentence in this cause;

It is, therefore, ordered that the said conviction be, and the same is hereby affirmed, and do stand in full force and effect; and that the sentence passed upon the defendant by the said Court of King’s Bench, Crown Side, at Beauharnois, be carried out according to law;

Dissenting, the Honorable Justices Blanchet and Würtele.”

Conviction upheld.

D. McAvoy, for the appellant.

D. McCormick, K.C., for the private prosecutor.

N.B.—An appeal taken to the Supreme Court of Canada was dismissed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE KING v. BOWERS (No. 2).

Summary trial—Theft over \$10—Plea of not guilty—Jurisdiction of city stipendiary magistrate—Crim. Code, secs. 785, 789, 790.

1. On a charge of theft where the value exceeds \$10 and the accused consents to a summary trial before a city stipendiary magistrate, such magistrate is not bound to remand him under Code, sec. 790, upon his pleading "not guilty," but has a jurisdiction, apart from sec. 790, conferred by Code, sec. 785, under which he may try the charge and impose the same punishment as might be imposed by a court of general sessions in Ontario.

ARGUED: February 13, 1903.

DECIDED: February 14, 1903.

MOTION on notice to the Attorney-General of Nova Scotia, the convicting Magistrate and the jailor, under chapter 181 of the Revised Statutes of Nova Scotia 1900 "Of Securing the Liberty of the Subject" on the return of an order in the nature of a writ of habeas corpus and of a further order under section 7 of the Statute directing the Magistrate to return the record of the proceedings before him relating to the matter in question, for the discharge from the custody of the defendant a prisoner in the county jail at Halifax under a warrant of commitment reciting a conviction made by the Stipendiary Magistrate of the city of Halifax under Part LV. of the Criminal Code "for that he the said Frank Bowers did in the said city of Halifax on the 2nd day of February, A.D. 1903, unlawfully steal one coat the property of John McEachern valued under \$20.00" and for which he was adjudged to be imprisoned in the County jail at Halifax for the term of nine months with hard labour.

The defendant had been arrested and brought before the convicting Magistrate for the purpose of a preliminary examination on the above charge and also on a further charge of stealing in the city of Halifax on the 2nd day of February, A.D. 1903, two books, the property of Thomas W. Davis, valued under

\$20.00. After committal for trial on both these charges, but before the actual signing of a warrant of Commitment on the 4th day of February, A.D. 1903, the defendant at the request of his counsel was brought before the committing Magistrate and elected for a summary trial on the charge of stealing the coat, and on pleading "not guilty" was tried and convicted as aforesaid. On the charge of stealing the books he elected to be tried before a jury and was committed to jail accordingly. The jailor returned to the habeas corpus a copy of the warrant of Commitment in execution reciting the conviction for the theft of the coat, and also a copy of the warrant of Commitment for safe custody for stealing the books.

The motion for his discharge from custody was made on the ground that under sections 789 and 790 of the Criminal Code 1892, the Magistrate could impose a sentence for the offence of which the prisoner was convicted only in the event of the prisoner pleading "guilty" and not after a trial on a plea of "not guilty."

HALIFAX, N.S., February 13, 1903.

W. J. O'Hearn, for the prisoner.

Andrew Cluney, for the Attorney-General of Nova Scotia.

HALIFAX, N.S., February 14, 1903.

RITCHIE, J.:—Before section 785 of the Criminal Code was amended by adding two sub-sections, all the Stipendiary and Police Magistrates had with the consent of the accused jurisdiction to try thefts when the value of the property did not exceed \$10, and in cases where the accused pleaded "guilty" to pass sentence when the value exceeded \$10. (Sections 783, 784, 786, 789, 790.) The amendment of section 785 gave additional power to Police Magistrates of cities and incorporated towns, who have now power to try offences with the assent of the accused for which he might be tried at a Court of General Sessions of the Peace. These offences are defined by sections 539 and 540 and

I think the Stipendiary Magistrate of the city of Halifax did not exceed his jurisdiction in trying the prisoner for a theft of property over \$10 in value with his consent when he pleaded "not guilty."

The return of the jailor also shews that the prisoner is detained to await his trial at the next term of the Supreme Court for the theft of two books for which he declined to be tried summarily. This alone will prevent his discharge.

The motion for the discharge of the prisoner will be refused.

Prisoner remanded.

Note: Summary trials for theft.

Part LV. of the Criminal Code confers the following different powers of summary trial for the offence of theft:—

(a) Without the consent of the accused where the charge is brought against a seafaring person only transiently in Canada in the cities of Montreal or Quebec or any other seaport city or town, and the value is under \$10. (Secs. 783 (a) and 784, sub-sec. 2.)

This power of summary trial is exercisable by any of the functionaries having jurisdiction at the places mentioned who are included in the definition given by sec. 782 of the term "magistrate" as applicable to summary trials, i.e.:—

(i.) In the Provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court, being a justice of the peace, commissioner of police, judge of the sessions of the peace, police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or of its jurisdiction;

(ii.) in the Provinces of Nova Scotia and New Brunswick, any recorder, judge of a county court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace;

(iii.) in the Provinces of Prince Edward Island and British Columbia, and in the District of Keewatin, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(iv.) in the North-West Territories, any judge of the Supreme Court of the said Territories, any two justices of the peace sitting

Note—Continued.*Summary trials for theft.*

together, and any functionary or tribunal having the powers of two justices of the peace;

(v.) in all the Provinces, any two justices of the peace sitting together.

The punishment is then limited to six months' imprisonment with or without hard labour. (Sec. 787.)

(b) Without the consent of the accused where the charge is brought against him on the complaint of any such seafaring person whose testimony is essential to the proof of the offence, and the value is under \$10. (Secs. 783 (a) and 784, sub-sec. 2.)

This power is exercisable by the same functionaries as are competent to try under sub-sec. 2 of sec. 784 as before mentioned.

The term of punishment must not exceed six months' imprisonment with or without hard labour.

(c) With the consent of the accused whether or not the value is under \$10, before—

(1) A police magistrate of a city or of an incorporated town in Canada.

(2) A stipendiary magistrate of a city or of an incorporated town in Canada.

(3) A recorder of a city or incorporated town if entitled to exercise judicial functions.

(4) A police magistrate for a county or district or for part of a county or district in the Province of Ontario. (Code sec. 785 (1) and R.S.O. 1897, ch. 87.)

(5) A stipendiary magistrate in any county district or provisional county in the Province of Ontario. (Code sec. 785 (1).)

The accused is liable in such cases to the same punishment as if he had been tried upon an indictment (sec. 785), viz.:

(1) In the special cases referred to in Code sections 319-355 inclusive, the punishment therein specified.

(2) Theft (value not over \$200), in cases not otherwise provided for, and where there is no charge of a previous conviction for theft—seven years.

(3) Theft (value not over \$200), in cases not otherwise provided for, but where offender has been previously convicted of *theft*—ten years.

(4) Theft (value over \$200), the above punishments and two years additional. (Cr. Code, sec. 357.)

Where the summary trial comes within sec. 785 an appeal may be taken by way of reserved case under Code secs. 742 and 743, or if a reserved case is refused, then upon leave to appeal granted by the Court of Appeal, and a case stated by direction of that Court under sec. 744.

Note—Continued.

Summary trials for theft.

(d) With the consent of the accused, where the value is under \$10, before any of the other functionaries mentioned in sec. 782 not qualified to act under sec. 785 (*i.e.*, not included in sub-division (c), *supra*), or not exercising the jurisdiction conferred by sec. 785, although competent to do so.

The punishment in these cases must not exceed six months' imprisonment. (Sec. 787.)

If two justices of the peace sitting together constitute the summary trial court, there is a right of appeal in the same manner as from summary convictions, but otherwise there is no appeal. Secs. 782 (*a v.*), and 808; *R. v. Egan* (1896), 1 Can. Cr. Cas. 112 (Man.); *R. v. Racine*, 3 Can. Cr. Cas. 446 (Que.); *R. v. Nixon* (1900), 5 Can. Cr. Cas. 33 (Ont.).

The jurisdiction of two justices to hold a summary trial under Part LV. is restricted to offences under paragraphs (a) and (f) of sec. 783, and does not include the offence of having *attempted* to commit theft, which comes under paragraph (b) of that section.

(e) With the consent of the accused before any of the functionaries last mentioned, where the value is over \$10, and the evidence already heard by the magistrate in the course of a preliminary enquiry is in his opinion sufficient to put the accused upon his trial, and the case appears to the magistrate to be one which may properly be disposed of in a summary way, and where the accused pleads guilty. (Secs. 789 and 790.)

The accused is thereupon liable to the same punishment as if he had been tried upon an indictment. (Sec. 790.)

The absolute jurisdiction of summary trial which is specially conferred upon magistrates in Prince Edward Island, British Columbia, the North-West Territories and Keewatin, does not apply to cases coming under secs. 789 and 790.

If the accused is a "juvenile offender," *i.e.*, if, in the opinion of the justice, magistrate or other functionary designated by Code sec. 809 before whom the person charged is brought, the age of such person does not exceed 16 years, the procedure and punishment shall be that prescribed by Part LVI. of the Code.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE HUNTER, C.J., WALKEM, AND DRAKE, JJ.

NICHOL v. POOLEY et al. (No. 2).

Criminal libel—Costs—Taxation or action for—Stay—Cr. Code, secs. 833-35.

1. Where the accused, after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs, the civil action will be allowed to proceed only on terms of the plaintiff undertaking to abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case.

Nichol v. Pooley (1902), 6 Can. Cr. Cas. 12, affirmed.

ARGUED: June 23 and 24, 1902.

DECDED: June 24, 1902.

APPEAL by defendants from judgment of Irving, J., 6 Can. Cr. Cas. 12, *ante*, on a summons by defendants to stay all proceedings on the ground that the plaintiff had no right to maintain the action and that the same was vexatious and an abuse of the process of the Court.

The action was to recover the amount of costs incurred by the plaintiff by reason of an indictment (*Rex v. Nichol*, 5 Can. Cr. Cas. 31) brought by the defendants against him for criminal libel upon which a verdict of not guilty and judgment accordingly had been rendered at a third trial; the two former trials of the indictment had been abortive owing to the jury disagreeing in each instance.

Upon the application of the accused in *Rex v. Nichol*, McColl, J., had made an order for a commission to examine witnesses for the defence in England, and by the order had reserved the costs of the commission to be dealt with by the Judge who should try the indictment. The commission evidence was used by the accused at the first two trials, but not at the third trial.

The plaintiff, after judgment had passed for him on the indictment, delivered to the defendant a bill of costs incurred

by reason of the indictment under section 833 of the Criminal Code, and obtained an appointment from B. H. T. Drake, the Registrar of the Supreme Court, who had also acted as Clerk of the Court at the criminal trial, for the taxation of the plaintiff's costs.

The plaintiff and defendants by their solicitors attended upon the appointment, the taxation was proceeded with, and all the items were passed upon by the taxing officer, but the taxation was not closed because the officer had refused to allow to the plaintiff the costs of the commission evidence without an order of the Judge who tried the indictment. The officer had allowed to the plaintiff his costs of the two abortive trials, though objected to by the defendants. The plaintiff Nichol thereupon made an application in *Rex v. Nichol*, upon notice of motion, to Drake, J., who had tried the indictment, for an order that the costs of the commission reserved to be dealt with by the trial Judge by the order of McColl, J., be taxed and paid to him. On the return of that motion, Drake, J., ordered the plaintiff's application to be dismissed, holding that the plaintiff was not entitled to any of the costs of the abortive trials, and was therefore not entitled to the costs of the commission as the evidence had not been used at the last trial (*Rex v. Nichol* (1901), 6 Can. Cr. Cas. 8, 8 B. C. R. 276).

The taxation was not closed, but the plaintiff then brought this action and delivered as particulars under his statement of claim the same bill of costs that he had submitted to taxation.

Irving, J., held [*Nichol v. Pooley*, 6 Can. Cr. Cas., p. 12, *ante*] that the plaintiff should not be allowed to pursue both remedies at once, but as in the criminal proceedings there was no appeal, he should be allowed to proceed with this action on terms.

VICTORIA, B.C., June 23 and 24, 1902.

Cassidy, K.C., and *Luxton*, for the appeal: Taxation of the bill and an allocatur are conditions precedent to the right of

action: see section 835, which provides for the recovery of the amount either by warrant of distress or action, and a warrant of distress can only be applicable to an ascertained sum: Odger on Libel, 643; *Mackay v. Hughes* (1901), 19 Que. S.C. 367, indicates that the action may be brought, but the proceedings will be stayed till a taxation is had, so that a taxation is the proper mode of ascertaining the amount, and action or distress the mode of recovering the amount when ascertained. The plaintiff having proceeded with taxation is bound by the result.

This is not a case of a plaintiff pursuing two remedies at the same time, but of a party who, having a judicial mode of procedure and determination open to him, adopts that mode, and, obtaining a result contrary to his desires, proposes to treat what has taken place as a nullity and to re-agitate the matter de novo in another form in the same Court. If the plaintiff was dissatisfied with the decision of Drake, J., he should have appealed. As to the condition nominated in the judgment of Irving, J., that the plaintiff should submit to the decision of the trial Judge herein as to the costs of the taxation in *Regina v. Nichol*, there is no power to relegate that matter to the decision of the Judge. The base of this application is that the exercise by the Court of the jurisdiction to stay the action is the only mode of redress open to the defendants on the facts. Before the Judicature Act they could have pleaded the pendency of the taxation proceedings in abatement, but pleas in abatement being abolished (Order 21, r. 20) the motion to stay is the only available substitute and matters of abatement are now tried on affidavit on such motions. see An. Pr. (1902), 404; *McHenry v. Lewis* (1882), 22 Ch. D. 397, and *The Christianborg* (1885), 10 P.D. 141 at p. 153. If the question is not dealt with on this motion it cannot be raised in any other way: see also *Earl Poulett v. Viscount Hill* (1893), 1 Ch. 277 at p. 281.

The subject matter of the statement of claim is not res judicata nor is there an estoppel in the strict sense by reason of the taxation, or order, as there is no record, in the technical sense, the proceedings being in their nature interlocutory. The defen-

dants cannot therefore take advantage of the point by pleading As a defence these facts may in law constitute no answer to the action, but in substance there is an equitable estoppel and the Court in the exercise of its general jurisdiction will not permit the action to proceed: see *Stephenson v. Garnett* (1898), 1 Q.B. 677, and *In re May* (1885), 28 Ch. D. 516, at p. 518. The authorities which indicate that the Court should not, except in a very plain case, dismiss an action on the ground that the statement of claim discloses no reasonable cause of action, or is frivolous, have no application to the present motion which goes behind the statement of claim and appeals to the general jurisdiction of the Court to stay vexatious proceedings and it must be dealt with on the base that it is the only recourse of the defendants.

Davis, K.C., for respondent: A successful defendant by taking proceedings by warrant of distress to recover his costs would get into a sea of doubt in working out his proceedings. Who is "the proper officer to determine" the amount of costs? But a debt is created by section 833 and the action lies without more; the language is clear and must be given its ordinary meaning. The English Statute (6 & 7 Vict., c. 96, s. 8,) is materially different from ours. He cited *Richardson v. Willis* (1873), 42 L.J., Ex. 68, and *Reg. v. Steel* (1876), 1 Q.B.D. 482.

See facts as shewn in *Rex v. Nichol* (1901), 6 Can. Cr. Cas. 8, 8 B.C.R. 276, and from which leave to appeal was procured and a case was stated by the Judge, but I came to the conclusion that there was no right of appeal as the order was made in a criminal matter in which there was no conviction: see Code section 742; *Rex v. Trepanier* (1901), 4 Can. Cr. Cas. 259, and *Reg. v. Mosher* (1899), 3 Can. Cr. Cas. 312.

As to the question of the costs of the abortive trials decided against defendant in *Rex v. Nichol*, the defendants' motion was to be allowed the costs of the commission evidence which had been reserved by the order under which the commission was issued for the trial Judge and on that motion the authorities as to the costs of the abortive trials were not cited, but the Judge came

to the erroneous conclusion that the costs of the abortive trials could not be allowed to the defendant, and of course the costs of the commission fell with the rest. The taxing officer at first taxed all our costs except those of the commission and then on the motion for commission costs only defendant was deprived of all the costs of the first two trials, the judgment being founded on *Brown v. Clarke* (1843), 12 M. & W. 24, but now the costs of the abortive trials follow the event: see *Green v. Wright* (1877), 2 C.P.D. 354, and *Field v. Great Northern Railway Co.* (1878), 3 Ex. D. 261.

Bartlett v. Higgins (1901), 2 K.B. 230, shews that we are entitled to the costs of the commission. Section 835 is new and is not connected with section 833; 835 only refers to costs ordered to be paid by a Court, but the plaintiff in this case can bring his action without an order: see *Richardson v. Willis* (1872), L.R. 8 Ex. 69.

As to his alibi pendens, that there is another action or that that matter is being agitated elsewhere is not a ground of estoppel—it is only a ground for putting a party to an election: *Behrens v. Pauli* (1837), 1 Keen 457, and *McHenry v. Lewis* (1882), 22 Ch. D. 397. The taxing officer is not “a Court of competent jurisdiction” and besides he gave no decision so the doctrine of *res judicata* cannot be used against us.

The other side are appealing to the Court’s discretion, but at the same time seeking to take advantage of the highest kind of a technicality; they are trying to shut us out of our appeal on the ground of quasi consent or acquiescence, but that is a criminal proceeding and the ordinary civil rules don’t apply: *Reg. v. Judge of the County Court of Shropshire* (1887), 20 Q.B.D. 248, and *Stephenson v. Garnett* (1898), 67 L.J. Q.B. 447, at p. 449, Smith, L.J. If there is any doubt at all the action should be allowed to go to trial.

Cassidy, in reply: These costs are “ordered to be paid” and section 835 applies to them. The judgment for defendant carries an order for the costs *sub silentio*. The practice in Eng-

land is to take the order out in the form of a side bar rule: *Reg. v. Latimer* (1850), 15 Q.B. 1,077. The "proper officer" is persona designata as the tribunal to adjudicate. The only jurisdiction of this Court is to furnish machinery to collect the amount ascertained if unpaid as an alternative to proceedings in distress. It is a nominated remedy. It may be that there is no appeal from the decision of the "proper officer" to a Judge of this Court: see *Reg. v. Newhouse* (1853), 22 L.J.Q.B. 127, but that accentuates the position that the proper officer is the only tribunal having jurisdiction to ascertain the amount, and not this Court.

The Appellate Court has always power to set aside any order of a Judge made without jurisdiction: see Strong, J., in *In re Sproule* (1886), 12 Can. S.C.R. 140, and the defendant should have appealed. The taxation was not closed and Mr. Justice Drake's judgment may be taken as an advisory determination by an arbitrator before whom the parties went. We prefer that the plaintiff should now have leave to appeal from Judge Drake's order. At all events either this action does not lie, or it is improperly brought after what has taken place and it is vexatious.

VICTORIA, B.C., June 24, 1902.

The judgment of the Court was delivered by

HUNTER, C.J.—The Court is unanimously of the opinion that the appeal should be dismissed. The jurisdiction to stay ought to be exercised only in a plain case. The defendants should be allowed to plead any estoppel which they may think exists by reason of the taxation proceedings or the rulings of Mr. Justice Drake. We would suggest that the parties should settle as there may be a radical difference of judicial opinion both here and at Ottawa as to what is meant by the "lowest scale of fees allowed in such Court" in paragraph 835, i.e., whether it is the Supreme Court tariff or the lowest County Court tariff which is sometimes allowed in a Supreme Court action.

Appeal dismissed with costs.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE PAGNUELO, J.

MURFINA v. SAUVÉ ET AL.

False arrest—Damages—Liability—Justice of the peace issuing a warrant of arrest without inquiring into complainant's grounds—Crim. Code secs. 558, 559, 569.

1. A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant had to suspect the accused, becomes liable towards the latter under the laws of Quebec, when the complaint was not justified by any serious, reasonable or plausible ground.

DECIDED: March 2nd, 1901.

THIS was an action for false arrest brought against the complainant and against the justice of the peace who issued the warrant of arrest. The circumstances of the case and the contentions of the parties are set forth in the notes of the learned Judge.

MONTREAL, March 2nd, 1901.

(Translation.)

PAGNUELO, J. :—This case presents the question of the responsibility of the justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant had to suspect the accused, when the complainant was not justified by any serious, reasonable or plausible ground. The complainant further lays the very grave charge against the justice of the peace of having entered into an agreement with the complainant to divide between them the whole of the amount stolen which would be recovered, and of having issued a warrant of arrest against the plaintiff for the purpose of obtaining the money from him through fear of criminal proceedings taken against him.

If this accusation against the justice of the peace were proved, the discussion would be very short, because there would

be malice manifested, abuse of the authority of justice, and at the same time a criminal act on the part of the magistrate.

Let us state the facts, as they have been established by the proof.

An Italian named Christiani had had stolen from his house, in the evening of December 26th, 1899, a sum of money amounting to \$518.00 and a silver watch, whilst he was visiting at the house of his neighbour, named Joseph Lacombe. It was in the Parish of Coteau du Lac. The next morning Lacombe conducted Christiani, who is a simple man, ignorant and speaking very little French, to the house of defendant Sauvé, justice of the peace, merchant and superintendent of the Soulanges Canal. Lacombe requested Sauvé to telegraph to the detectives of Montreal to search for the thieves, but he replied to him that the detectives would not come unless a sum of \$20 to \$25 was deposited for their expenses; the idea of calling on the assistance of the detectives was then abandoned, because Christiani had no more money. In the store, Christiani then declared publicly that he would give half of the sum stolen to any one who would take up the affair. Lacombe swears that he then asked defendant if he would receive one half, provided he took up the affair and that Sauvé replied in the affirmative. Sauvé denies this conversation, and also all knowledge of the offer of Christiani, but he is contradicted by his witness Pierre Sauvé who heard the public offer, and who had himself asked Sauvé if he intended to accept the proposition of Christiani. The defendant Sauvé replied that he could not do so. The next day, 28th December, the defendant Sauvé went himself with a bailiff to plaintiff's boarding house where, with the permission of the boarding house mistress and in the absence of plaintiff, he through the bailiff searched the plaintiff's room and among his effects, but without result. No complaint written and under oath had been made by Christiani to justify these searches, and no warrant of search had been issued. Two days later, the 30th December, the defendant Sauvé himself drew a complaint in which Christiani swore that he strongly suspected the plaintiff of having, with malice afore-

thought, broken open his door and of having stolen from him \$518 in silver and a silver watch, and later he issued a warrant of arrest against the plaintiff. He was arrested, liberated without bail, and on the 3rd January, he was summarily tried, before the defendant Sauvé, and was acquitted, because no proof whatever existed against him. Christiani himself admits that he had no ground to suspect the plaintiff more than any one else. The defendant Sauvé made the same admission when he was examined as a witness. Christiani, said he, suspected everybody, and after the plaintiff had been liberated, he swore out a second complaint of the same nature against one Devaux, which has likewise been dismissed for want of proof. Lacombe may, it seems, have mentioned that he had seen plaintiff wandering about the environs of Christiani's residence, but it could not have been at the time of the theft, since he had passed the evening at his house with Christiani, and neither he nor any other person could have seen the plaintiff on the road. One other ground mentioned at the hearing was that the plaintiff was a compatriot of Christiani.

The defendant Sauvé pleads, as a defence for not having inquired into the grounds that Christiani had to strongly suspect the plaintiff, by saying that that did not concern him, that it was sufficient for him that Christiani swore in the terms of the Criminal Code that he strongly suspected the plaintiff of having committed the theft.

This defence is untenable, and if it were accepted, would have the most dire consequences. The justice of the peace would be able, under this pretext, to arrest by turn, all the principal citizens of the locality, the more so as Christiani is a simple man, and that he trusted entirely to the magistrate. The defendant Sauvé cannot be ignorant, after what has transpired, that Christiani had no reasonable and plausible ground to suspect the plaintiff, and if the agreement charged is not absolutely proved one cannot help thinking that the public offer of Christiani influenced the conduct of the justice of the peace considerably, both in the searches of the domicile of plaintiff, illegal and with-

out a sworn complaint, and in the subsequent arrest of the latter on the warrant of the justice of the peace.

The pretention of the defendant Sauvé is condemned both by the English common criminal law and by the Criminal Code of Canada.

Chitty, Genl. Practice, vol. 2, p. 165:

“It is incumbent on him (the magistrate) to take care
“that such informer or deponent do state in such oath the
“particular facts as they occurred, and that he do not swear
“by the card in the very words of the Act; and unless facts
“are apparently truly sworn essential to constitute the
“offence complained off, the magistrate should not issue his
“*summons*, and certainly not a *warrant*, upon a *general*
“information, however technically correct.” *Cohen v. Morgan*, 6 Dowl. & Ry. 8.

Id., p. 168: “One of the greatest lawyers that ever presided in the Court of King’s Bench (Lord Tenderden), frequently expressed his wish that justices would always, when an information is preferred, interrogate the informer and his witnesses before he issued his summons, or warrant, whether there was not some circumstance, stating each, which might under the Act constitute a defence, and not to proceed until he was satisfied that, at least, it was most probable there was not a *prima facie* defence; by which means, he observed, much trouble and many frivolous informations would be avoided.”

In a case of *Candle v. Seymour*, 1 Ad. & El., N.S., 889, a magistrate was condemned for trespass or false arrest because the complaint had been laid before the clerk of the magistrate, and not before the magistrate himself, who had not been able to investigate the grounds of accusation against the defendant, and because the Court found that the complaint was without serious foundation.

“It is far too common a practice,” said Coleridge, J.,
“for the clerk to examine the witnesses apart, and take down
“the answers, and then read them over to him in the magis-

"trate's presence. . . . A magistrate taking depositions
"has a discretion to exercise; he is to examine the witnesses,
"hear his answers, and judge of the manner in which they
"are given. If he does not, how is he, supposing the charge
"were felony, to decide whether or not bail shall be taken?"

Mr. Edward Carter, in an excellent little treatise on summary convictions, has then reason to conclude:

"These authorities sufficiently establish that in all cases
"where personal liberty is concerned, magistrates should
"exercise more circumspection and care, and that in taking
"an information upon which a warrant is to be issued, *they*
"have a discretion to exercise, and that they should them-
"selves judge of the weight and importance of the facts
"stated, and from their own conclusions, *from what they see*
"and hear, of the propriety of arresting the party com-
"plained against" (p. 58).

The magistrate who voluntarily closes his eyes so as not to see that the accusation is futile, as the defendant Sauvé has done, and who guards himself by a vague form which he ought to know to be without foundation, consequently fails seriously in his duty; he commits a fault which, according to art. 1053 of the Civil Code, renders him responsible for the consequences of this false arrest.

I have hitherto stated only the principles of common law on the duties of the justices of the peace before issuing a warrant of arrest. Our Criminal Code has confirmed them in a formal manner in articles 558, 559 and 569.

558: "Any one who, *upon reasonable or probable*
"*grounds*, believes that any person has committed an indict-
"able offence against this Act may make a complaint or lay
"an information in writing and under oath before any
"magistrate or justice of the peace having jurisdiction to
"issue a warrant or summons against such accused person
"in respect of such offence."

559: "Upon receiving any such complaint or informa-
"tion the justice shall hear and consider the allegations of

“the complainant, and if of opinion that a case for so doing
“is made he shall issue a summons, or a warrant, as the case
“may be, in manner hereinafter mentioned.”

569: “*Any justice who is satisfied by information upon
“oath . . . that there is reasonable ground for believing
“that there is in any building, receptacle or place: (a) any-
“thing upon or in respect of which any offence against this
“Act has been or is suspected to have been committed; or
“(b) etc.,—may at any time issue a warrant under his hand
“authorizing some constable or other person named therein
“to search such building, etc.”*

The duties of the magistrate cannot be defined in a more precise manner: he ought to hear and weigh the allegations of the complainant, and if he is convinced that the grounds in support of the complaint are reasonable and plausible, he will issue a summons or a warrant of arrest, according to the circumstances. Similarly as to search warrants, he can only authorize them on a complaint made under oath and on being convinced that there is a reasonable ground to believe that one will discover objects or other effects which it is believed, *on reasonable ground*, would offer proof of a crime committed, or would serve to commit a crime.

The defendant Sauvé cannot then shift the responsibility of the serious fault which he has committed towards the plaintiff. He has not even the pretext of being able to say that complaint is made in the terms of the Code, because the form C, to which art. 558 refers is thus drawn up: “The information and complaint of C. D. . . . who saith that,” (*etc., stating the offence*).

His conduct in going himself, without a complaint, under oath and without a warrant, to make searches at plaintiff's house with a bailiff, is unjustifiable, and although this fact may not be alleged as a special injury by the plaintiff, and a distinct cause of damages, it constitutes an important element in an inquiry into the motives of the extraordinary conduct of the justice of the peace in the whole of this affair; or he has given proof of

gross ignorance of his duties, assimilated to legal malice; or the hope of a great reward, in case of success, has driven him to misconstrue the rules established by the simplest notion of natural law, as well as by the common law and a positive statute. In either case, he is responsible for civil damages to plaintiff, at least to a degree equal to the complainant himself. His responsibility is even greater than that of the complainant, who is guided entirely by the magistrate. There was no legal malice on the part of complainant, and in an analogous case the complainant was freed from all responsibility in England, in the case of *Cohen v. Morgan*, 6 Dowl. and Ryl. 8. See also Carter, p. 56.

However, Christiani, despite his ignorance and his good faith, had no ground to suspect the plaintiff, and he has committed the offence of making an offer to divide, which has not been without influence in the case.

I fix the damages at \$100, and the cost of an action of \$100 against the two defendants jointly and severally.

Judgment for plaintiff accordingly.

Rielle & Bond, attorneys for plaintiff.

Demers & De Lorimier, attorneys for defendants.

[COUNTY COURT OF DISTRICT NO. 4, NOVA SCOTIA.]

BEFORE HIS HONOUR, J. P. CHIPMAN, COUNTY JUDGE.

THE QUEEN v. YATES.

Highway—Sidewalk—Obstruction—Marching in procession—Impeding free passage of foot passengers—Nova Scotia Towns Incorporation Act, 1895.

1. Where a body of sixty students marched upon a sidewalk in files of four with arms linked, any of them may be properly convicted of an offence against a municipal by-law prohibiting "walking or marching in a group or near to each other on the sidewalk so as to obstruct a free passage for foot passengers," although sufficient space remained for persons walking in single file to pass them.

DECIDED: January, 1901.

APPEAL from a summary conviction under a municipal by-law.

Pineo, for the prosecution.

Roscoe and *Dunlop*, for the defendants.

KENTVILLE, N.S., January, 1901.

CHIPMAN, Co.J.:—The defendants, Yates and others, were convicted in the Court below "for walking or marching in a group or near to each other on the sidewalk of Main Street in the Town of Wolfville, so as to obstruct a free passage for foot passengers," contrary to the provisions of the Towns Incorporation Act of 1895.

The trial in this Court occupied a long time and a great deal of evidence was adduced by both sides.

The facts in the main, I am glad to say, are not disputed, and, although conflicting testimony was given, the case is free from the glaring and marked contradictions which are so frequently noticeable in contested suits.

Whether the offence charged was committed or not, depends upon the interpretation to be given to the language of the section, and its construction according to the rules of construction applicable to statute law in general.

Although many questions were fully argued by the respective solicitors of both parties, the real and vital issue, which was ably argued and relied upon by the defence, and strenuously opposed by the prosecution, makes it imperatively necessary to determine whether the defendants can be convicted of the offence charged, unless the prosecution can and has proved that an actual or de facto obstruction of the free passage for foot passengers was caused by the action of the defendants in marching with others four abreast, and consequently near to each other, on the sidewalk, on the occasion referred to.

The prosecution contends that the evidence established an actual obstruction in the case of the witnesses Suttée and Crowell in particular, and an obstruction, within the meaning of the statute, of the free passage to which foot passengers are entitled on the sidewalks of incorporated towns. The line is clearly drawn, and the task of settling or deciding this important question, for the first time in this Court, at least, must be faced and determined according to legal principles and the meaning of the language used in the section already referred to.

Although the case as stated was most fully argued, no authorities were cited in support of the arguments adduced by either counsel. General principles were of course adverted to, but nothing further. I have, therefore, been obliged to carefully examine all the authorities at my command, and also to cause an examination to be made of the authorities to be found at Halifax and Ottawa. I had hoped that the result thereof might be the finding of an authority directly in point as to the construction of a similar statute, but in this respect I have been disappointed. Authorities hereinafter mentioned were found, however, which have helped and materially aided me in arriving at a conclusion as free from doubt as it can truthfully be said that conclusions, depending upon the correct construction of statute law, or, in fact, the determination of questions of law in general, can ever be reached by ordinary methods and careful consideration. "Nothing," it has been said by a good authority, "is so difficult

as to construe properly an Act of Parliament, and nothing so easy as to pull it to pieces."

The section under consideration reads as follows:—

"Persons shall not stand, walk or march in a group or near to each other, on any sidewalk, crossing or bridge, so as to obstruct a free passage for foot passengers, or march in procession on any sidewalk or crossing, under a penalty of not more than ten dollars on each person so offending, and on non-payment thereof, to imprisonment in the jail or lock-up for a period not exceeding thirty days, and any person or persons refusing or neglecting after the request of the Mayor, any councillor, policeman, constable or watchman, to move and not obstruct such sidewalk, crossing or bridge, shall be deemed to have committed the above offences, and shall be liable to the penalty."

The facts are that sixty or seventy students of Acadia University, the defendants being among the number, smarting under a grievance, supposed or real, against the policeman of the town, met together and marched four abreast and with arms linked, from the college grounds to the sidewalk on Main Street, opposite the Baptist Church, and from thence east on the south sidewalk to the crossing opposite the electric light station, a distance of some two hundred and fifty yards. There they turned and marched back in a like manner on the same sidewalk and returned to the college grounds, from whence they started. While so marching they were shouting and singing a college song or "yell," said to have been imported from one of the universities in Europe, which, to say the least, was hardly in keeping with the high ideals taught by the learned professors of the University, or which the students in their calmer moments would consider consistent with their principles and lofty aspirations.

Students the world over enjoy exceptional privileges and are to be commended for their vivacity of spirits and the fun and amusement with which they intersperse their moments of relaxation from class and the hours of patient and arduous toil otherwise spent in preparation for their future life work. But, like

other citizens, they are answerable to the laws of the country in which they may reside, and are liable for infractions thereof, if they may happen to do that which the statute prohibits.

The sidewalk in question varies considerably in width, measurements at different points fixing the width at 9 feet 9 inches, 8 feet 9 inches, 11 feet 3 inches, 8 feet 4 inches, 7 feet and 7 feet four inches, from the inside limit to posts standing 18 inches from the inner curbing; the last named width of 7 feet and 7 feet 4 inches being opposite the building fence at the Hutchinson block. In all, 40 posts, trees and hydrants, equidistant 18 inches from the curbing, are located within the 250 yards referred to.

It was proved by one of the defendants, and confirmed by a witness for the prosecution, that five students walking abreast would occupy 6 to 7, but not more than 7, feet of the sidewalk. The evidence for the defence proved that there was room in most places for two persons, and in the narrowest place, for one person to pass the students during their march on the sidewalk in question, and the issue for adjudication resolves itself into one of construction of the statute, with the aid of legal decisions as to the rights foot passengers possess, and the purpose for which sidewalks or foot paths are set apart from the travelled portions of the road.

What is a free passage for foot passengers, and what is recognized either by the common or statute law, as an obstruction to or on the streets or foot paths?

To construe the section in question certain rules of construction must be applied, and the following may be briefly noted:—

“Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the Legislature, it must be enforced, even though it is absurd or mischievous.” Endlech on Statutes, section 4.

“When a term used in a statute has acquired at Common Law a settled meaning, that is, ordinarily, the technical meaning which is to be given to it in construing the statute.” Idem, section 3.

“When the words admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature, or to construe an Act according to its own notions of what ought to have been enacted.” *Idem*, section 7.

“The true meaning of any passage is to be found not merely in the words of the passage, but in comparing it with every other part of the law.” *Idem*, section 27.

“Construction is to be made of all the parts together, and not of one part by itself.” *Idem*, section 35.

“In a word, then, it is to be taken as a fundamental principle, standing, as it were, at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom and justice. If the language, read in the order of its clauses, presents no ambiguity and admits of no doubt or secondary meaning, it is simply to be obeyed, without more . . . ”
Idem, sections 72 and 339.

Before attempting to place an interpretation upon the language of the section in question, it may also be desirable to refer to some of the principles of law appertaining to highways, and the rights of the public therein, which are to be found in well authenticated or recognized cases.

“The public have a right to an uninterrupted passage along a highway for themselves and their carriages to its utmost extent, unobstructed by any impediment, subject however, to such temporary obstructions as all public highways must suffer in cases of evident necessity. They are entitled to the use and enjoyment of the whole of a highway, and no individual can appropriate a portion of it to his own exclusive use, and shield himself from responsibility by saying that enough is still left for the accommodation of others.” *Thompson on Highways*, 313, and cases cited.

“So a ditch dug on a public highway, which from the local circumstances of the country is seldom or never used but by one or more families, is still a public nuisance, not

because any considerable portion of the public is actually affected by it, but because it obstructs a passage, which all have a right to use." *Idem*, 320, and case cited.

In *Reg. v. United Kingdom Electric Telegraph Co.*, 31 L.J. M.C. 168, it was held that, "if the defendants placed posts in a highway so as to obstruct and prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood, the defendants ought to be found guilty. And also that the circumstance that the part passed over is not metalled or repaired for purposes of convenience, as has been said in several cases, really makes no difference; nor does it make any difference that the jury held that sufficient space was left."

"Any interference with the safe and convenient exercise of the public right of passage over the whole highway is generally speaking a public nuisance, rendering the guilty person, apart from any particular statutory remedy that may be available, liable to indictment, and to an action by a person suffering special damage." 12 English Ruling Cases 567.

In the case of *The King v. Russell*, 6 East 427, decided in the year 1805, and cited approvingly in the latest decisions, it was held that "the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance, and that the defendant was liable, although two carriages might pass on the opposite side of the street to that which he occupied with his own carriages."

"The right of the public to use a highway extends to the whole breadth thereof, and not merely to that part which is worked or actually travelled, and consequently an obstruction upon the untravelled part is a proper subject of complaint by the public. Nor is one justified in obstructing a highway by the fact that he leaves sufficient room for the passage of the public, it being stated that the obstruction is unlawful if the highway is thereby rendered less commod-

ious or convenient for the use of the public." *Am. & Eng. Encyc. of Law*, vol. 15, page 492.

In *Homer v. Cadman*, 55 L.J.M.C. 110, the appellant was summoned for "unlawfully and wilfully obstructing the free passage" of a certain highway. He had marched into the highway at the head of a band, and had taken up his position there, during which period no person could, without considerable inconvenience and danger, either walk or drive across that part of the highway where the appellant and his band and the crowd were stationed.

The magistrate was of the opinion that although there was a passage round the crowd available for traffic, the appellant was not entitled to appropriate to himself any part of the highway. Accordingly he was convicted. The Divisional Court (Mathew and H. L. Smith, JJ.) held upon these facts that there was evidence on which the magistrate could properly convict the appellant.

In *McKee v. McGrath*, 30 L.R. Ir. 41, it was held by the Exchequer Division, Ireland: "That if a person rides a bicycle on a footpath by the side of the road he commits an offence, although no evidence is adduced of the free passage of foot passengers being obstructed." By 14 & 15 Vict. c. 92, B. 31. "Any person who shall in any manner or by negligence or misbehaviour prevent or interrupt the free passage of any person or carriage on any public road or street, or crossing, shall be liable to a fine not exceeding twenty shillings."

The facts were these. McKee rode a bicycle on a footpath, which was by the side of a public road in a rural district. No one was obstructed, and no one except McKee was on the footpath at the time. The Justices convicted under above section, and the Court sustained the conviction.

It was also decided in 1 Hawk. P.C. c. 71, s. 49, "that it is no excuse for one who laid logs of timber along a highway that he laid them only here and there, so that the people might have a passage by windings and turnings through the logs."

The case of *Regina v. Plumer*, 30 U.C.Q.B. 41, seems, in my

opinion, to touch upon so many of the issues or questions raised in the case at bar, that I think it advisable to transcribe it herein in full.

(Headnote.) “The use of a velocipede on a sidewalk, though no one may be near it, may be an obstruction within the provision of a by-law that ‘no person shall by any vehicle encumber or obstruct the sidewalk.’

Moss, in Michaelmas term last, obtained a rule calling on the Police Magistrate of London and Patrick Wallace to shew cause why the conviction of the said Plumer by the Police Magistrate, in or about the seventh of April, 1869, on the information of Wallace, should not be quashed, with costs, on the ground that the magistrate had no jurisdiction to make the conviction, and that the same is in excess of his jurisdiction, and that there was no evidence before him to support the conviction, and that no offence was proved against the section of the by-law referred to in the conviction. The conviction alleged that the appellant encumbered and obstructed a sidewalk of one of the streets of London with a vehicle called a velocipede, contrary to the 36th section of the City of London, Ont., bylaw, passed the 9th of July, 1866. The section of the by-law provided: “That no person shall by any animal, vehicle, lumber, building, fence or other material, goods, wares, merchandise or chattels, in any manner encumber, obstruct, injure or foul any street, square, lane, walk, sidewalk, road, bridge or sewer now being or hereafter to be laid out and erected (except as hereinafter provided with respect to buildings).’

In the same term, no cause being shewn, *Osler* moved the rule absolute. The conviction cannot be maintained. Using a velocipede on the sidewalk was not *obstructing* the sidewalk, and the evidence shewed that no one was in the street about where the velocipede was and that it did not take up more room than a single person. ‘Obstruction’ means something of a permanent nature, or of a more permanent nature

than the mere passing along the sidewalk with such an article. Russell on Crimes, 4th ed. 485; *Regina v. Mathias*, 2 F. & F. 570.

WILSON, J.:—‘A velocipede, I should say, may be an obstruction or an encumbrance on a sidewalk. All that has to be done is to give the words a reasonable latitude in interpretation, just as we have to do when we use them. Now, to ordinary comprehension, a horse or a waggon or a drove of sheep or oxen driven along the sidewalk would be understood to be an obstruction or encumbrance to the legitimate use of it by those desirous of using it. I understand this language off the Bench, though not the most exact or scientific, and I do not know why I should not understand it as sufficiently precise for the purpose, on the Bench; and I understand it to mean that whoever by any of the means described in the by-law, prevents foot travellers from the free, safe and convenient use of the sidewalk, offends against the enactment. It is true that both *encumber* and *obstruct* are terms that are generally applied to more permanent acts, but the greater or lesser degree of permanency of continuance or durability can make no absolute difference in the nature of the act, nor can it make any difference that these terms are commonly applied to fixed articles; they may equally apply to an animal or to a person or to an inanimate thing in nature. A person may be obstructed in the performance of his duty, and I think that threats may constitute an obstruction.

The Dominion Act, 32 & 33 Vict. c. 28, enacts that ‘all persons loitering on the streets or highways and *obstructing* passengers by standing across the foot paths *or by using insulting language*, or in any other way, shall be deemed vagrants.’ That is a very plain exposition of what may be an obstruction.

The evidence cannot by way of review properly be looked at, but even read I am not prepared to say that the use of a velocipede while no one is in the streets is not an encum-

brance or obstruction of it. If it were not it must follow that in the night time every kind of nuisance and impediment could be laid upon the sidewalk without hindrance, and kept there, so long as it was moved by daylight. I think the rule must be discharged with costs."

Morrison, J., concurred.

I think the above authorities should be considered helpful in construing the section under which the defendants have herein been convicted.

The streets of incorporated towns are vested in the towns, and the Legislature has given the councils the right to regulate and control them under the provisions therein set forth. The Act also for the protection of the streets and in the interest of the public, prohibits the doing of certain things therein specifically mentioned.

Has the Act in plain and intelligible language prohibited the offence, with which the defendants are charged? To repeat, the section says "that persons shall not stand, walk or march in a group or near to each other on any sidewalk, crossing or bridge so as to obstruct a free passage for foot passengers, or march in procession on any sidewalk."

Sixty or seventy persons marching together in ranks or files of fours and with arms linked would in my opinion very effectually obstruct the free passage for foot passengers on the sidewalk in question, and render it less commodious or convenient for their use and enjoyment.

In the light of the authorities herein reported, and reading sections 173, 176, 177 and 180, with section 179, I cannot think that there should be much difficulty in interpreting the meaning of the words "free passage," nor what the statute means by using the words "obstruct" or "obstruction" when applied to sidewalks. Even if we read carefully the whole of section 179 together, it will be found that to march in procession on any sidewalk is an offence pure and simple, and no other proof would

seem to be necessary than that the defendants marched in and with said procession.

The intention of the Legislature would, therefore, seem to be that it was not only intended to prohibit or prevent the marching of persons in procession on sidewalks, but also the marching of persons in a group or near to each other, when the marching might possibly lack the formation and regulations usually attached to what is generally known or understood to be a procession.

It was not contended by the defence that the offence proved, if any, was "marching in procession," and for this reason that the defendants should not be otherwise convicted, nor do I think such a contention under the evidence should be acceded to.

The defendants, with others, unquestionably marched in a group and "or" near to each other, and, I think, the evidence sufficiently sustained the charge in this respect.

Mr. Roscoe further contended that the "foot passenger" referred to in the statute meant a passenger then passing or travelling along the street, and, therefore, not a person in a house near by or outside of the town. For this assertion the *Century Dictionary* was given as an authority.

"Foot passenger" is defined by the *Standard Dictionary* as "one who passes or travels on foot, as over a toll bridge."

"Foot path," a path for persons on foot.

"Foot walk," a sidewalk.

"Footway," a path or passage for pedestrians, foot path.

"Footways are part of the road most convenient for foot passengers, i.e., that the part of the road most convenient for foot passengers is as much part of the road as the other part, which can be used by horses and carriages." *Curtis v. Kesturn County Council*, 45 Chy. D. 509.

I am unable to accept Mr. Roscoe's definition and do not think the words "foot passengers," as used in the section, can be held to mean persons in motion, or in the act of then actually using the passage set apart for foot passengers, no more than it could be asserted that the words "vehicles" or "carriages," used in

section 180, could be interpreted to mean vehicles or carriages, then actually in motion. A foot passenger, I take it, is merely one who travels on foot as contradistinguished from one who travels in carriages or by other means of conveyance.

Again, Mr. Roscoe contended that the intent must determine the character of the offence, and if the defendants did not intend to obstruct the free passage for foot passengers, that they should not be convicted.

This contention is not borne out by the authorities.

In the absence of a statutory provision to the contrary, the knowledge or intent with which one acts in placing an obstruction in a highway is immaterial." Am. & Eng. Encyc. of Law, vol. 15, 502.

Under an Act making it an indictable misdemeanour to obstruct any public road, the intent was held to be immaterial." Endlech on Statutes, sec. 133; *McKibbon v. Slate*, 40 Ark. 480. "It is the act and not the intent that constitutes the offence."

While it is not really necessary to decide whether or not the witnesses Suttee and Crowell, or either of them, was obstructed during the progress of the march, yet, in the case of Suttee, at least, I am of the opinion that the prosecution established a case of a de facto or actual obstruction. He was unquestionably exercising his right as one of the public, and as a foot passenger, and failed to work his way past the students without halting and waiting until part of the procession had passed him. He carried with him in his right hand a box about 18 inches long, 8 inches high, and 8 inches deep, containing his plumber's tools, and was walking on the outside and right hand side of the sidewalk. Mr. Roscoe contended that he should have walked on the inside or left hand side of the sidewalk, where there would have been and was room for him to pass without interruption, and that he was wrongfully on the sidewalk carrying his box of tools.

Suttee admitted that without his box he could have passed without stopping. He was going west, and the students east, and

the width of the sidewalk was 10 feet 2 or 3 inches to the post where he halted until the rest of the procession passed him.

“The law of the road relates exclusively to travellers in carriages meeting upon a public highway, and does not regulate the conduct of persons passing over the sidewalk of a city.” Thompson on Highways, 441, and case cited; *Grant v. City of Brooklyn*, 41 Barb. (N.Y.) 384.

Our statute says: “Persons in driving upon the highway shall leave the centre of the road on their right hand.”

The defence gave some evidence of a custom relative to foot passengers passing on the sidewalks in Wolfville, but I do not think the evidence so given sufficient to establish a custom having the binding effect of a defined and recognized legal principle. No authority, statutable or otherwise, was cited in support of the contention that Suttee had not the right to walk on the sidewalk, carrying his box of tools in his hand. Doubtless if such an authority had been available it would have been produced. I know of none and until the ordinance or by-law is passed, prohibiting or fixing the size of the bundles or parcels that may be carried by foot passengers, while exercising the right of free passage on sidewalks, I shall hold that such passengers as Suttee are within their rights and privileges.

It seems to me that, in any event, it could not be held other than an obstruction to the sidewalk for 60 or 70 persons to march up and down thereon for an hour or more, and yet, according to the contention of the defendants, if they should leave a passage for one or two persons, the statute would not be violated, nor would the sidewalk be obstructed. If the passage were kept open for a stray passenger or two who might happen along during the period of the march, time would not be a factor in determining whether the “free passage” has been obstructed or not, i.e., if the contention of the defence should prevail.

Reviewing, therefore, the whole of the evidence submitted herein, and applying the principles of law herein referred to and laid down for my guidance, I am unable in the conscientious discharge of my duties to do otherwise than to confirm the convic-

tion below and dismiss the appeal with costs. The prosecution have leave to amend the conviction, if so desired, in conformity with the decision and the statute in this regard.

Appeal dismissed.

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDER LACOSTE, C.J., BOSSE, BLANCHET, HALL,
AND WURTELE, JJ.

THE KING v. BELANGER.

Grand Jury—Procedure on swearing in the grand jurors—All jurors to be impannelled when foreman sworn—Bill of indictment—Initialling witnesses' names endorsed, when sworn—Depositions at preliminary enquiry—Use of before grand jury—Motion to quash indictment—Cr. Code secs. 645, 666.

1. The swearing in of a grand jury should take place after its members are duly impannelled; and the foreman's oath should be sworn in the presence of the other grand jurors, they being afterwards sworn to observe the same oath.
2. Where the grand jurors were called and answered to their names and then the juror selected as foreman was impannelled alone and sworn, after which the other jurors were called from amongst the spectators to the box and were sworn to observe their foreman's oath, their proceedings are invalid and an indictment found by them should be quashed on motion.
3. Section 645 of the Criminal Code which requires that the foreman of a grand jury shall initiate upon the bill of indictment the names of the witnesses examined before the grand jury is imperative and not merely directory, and the failure to observe it is good ground for quashing the indictment.
4. *Per WURTELE, J.*—Depositions taken at the preliminary enquiry can only be read to a grand jury in cases where such depositions can be used as evidence before a petit jury.

MONTREAL, December 23rd, 1902.

THE judgment of the Court was delivered by Mr. Justice Hall, the following written opinions being handed out by Hall and Würtele, JJ.

HALL, J.:—At the last term of the Court of King's Bench for the District of St. Francis, the accused was tried and found

guilty under an indictment for conspiracy. He applied for and obtained an arrest of sentence in order that the opinion of this Court might be obtained, upon a reserved case, stating certain grounds of alleged irregularity on the part of the Grand Jury in connection with the indictment, and on the part of the trial Judge in the admission of certain evidence.

The irregularities alleged on the part of the Grand Jury are:—

1. That the grand jurors were not properly sworn, the foreman having been first called to the grand jurors' box, and while alone in it, having taken the oath in use on such occasions. The other grand jurors having in the meantime been in different parts of the room, were then called up, by divisions of three, and sworn to observe the same oath their foreman had taken, without the text or even substance of said oath having been repeated to them.

2. That illegal evidence was submitted to the Grand Jury in the form of the record of the preliminary examination, including the depositions and certain unauthenticated copies of documents used upon an examination of the same subject matter by the Council of the Bar of the District of St. Francis, of which the accused was a member.

3. That the foreman of the Grand Jury failed to comply with the requirements of the Criminal Code as to initialing the names of the witnesses examined before the Grand Jury.

The complaint as to the ruling of the trial Judge was in having allowed verbal evidence to be submitted to the jury, of admissions made by the accused as to the payment of a certain sum of money, when the Crown alleged that accused had given a written receipt of said payment, the loss or absence of said receipt not having been legally established.

The alleged irregularities in regard to the Grand Jury formed the subject of a motion to quash the indictment brought in by them against the accused, before plea was entered for him, but his motion in this respect was rejected by the trial Judge. The admission of the said verbal evidence was also objected to by the

accused at the trial, and the objection was over-ruled, so that all the grounds thus invoked came before us free from any complication as to acquiescence or waiver.

Much of what is called "matter of form" has been swept away, both in the civil and criminal branches of our modern procedure. Courts try to get at the substance, the merits, the vital and controlling issue between the litigants before them. But there are formulas which have been in use since time immemorial which are more than idle words; which represent principles of the highest importance, and on the use of which we insist even in some cases when the reason on which they were founded is no longer remembered. Such are especially the forms and formulas of our criminal law, based almost exclusively on that of England, a system which one may describe, without fear of contradiction, as the best in the combined interest of the state, and the protection of the subject, that the world has ever produced. It is based on the presumption that everyone is innocent until proved to be guilty, and in the procedure to establish guilt there are so many safeguards for the protection of the accused that the axiom has almost become a legal text, that it is better that ninety-nine guilty should escape than that one innocent person should suffer. One of the safeguards, secured by a specific clause in Magna Charta, is the Grand Jury, whose duty it is to investigate each charge of alleged violation of the criminal law, and to determine whether or not there is sufficient *prima facie* evidence of guilt to subject an accused person to the odium and expense and risk of a criminal process. Such a bulwark is this "Grand Inquest," as it is called, that neither the King himself, nor the Judges of the highest Courts, can subject any man to a criminal trial before a petit jury, without the intervention and fiat of a Grand Jury, if we except the case of the "Criminal Information" formerly permitted in England to the Attorney-General, but which I think I may safely state to be obsolete here at least, if not throughout the Empire. While such an institution is a bulwark against oppression, it is easy to see what a power for tyranny it may be made unless surrounded and controlled by proper safeguards. One of

them is that the grand jurors must be selected from the most independent class in the community, wealth and position considered; a second, even more important, that their duties must be discharged under the solemnity of one of the most impressive oaths that can be found in the whole body of legal procedure; a third, that the names of the witnesses examined by them shall not only be endorsed upon the indictment which they bring in, but, for greater certainty, that the name of each person thus examined shall be ear-marked or identified by the initials of the foreman of the jury; another, that their presentments must be made in open Court to avoid any danger of collusion or secret intrigue, etc.

These are illustrations of a procedure which from beginning to end, is impressive both from its antiquity and its solemnity, and which is a part, and an important one, of that system of criminal law which we highly prize, and which we should shrink from tampering with in any of its details. It is a perfect chain, and who can say that one of its links can be broken with impunity? Of innovations upon these forms, Blackstone has well said "Though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern." In *The Queen v. Thompson*, reported in 1 Cox Crim. Cases 268, where a bill of indictment was sent before the Grand Jury, found and endorsed by them as a true bill, but accidentally mislaid, and brought into Court by one of the grand jurors, after the jury had been discharged, it was held by Cresswell, J., that there had been no legal presentment and that the bill must be submitted to the Grand Jury at a subsequent term.

That the Grand Jury must be sworn, every member of it, specially and intelligently sworn, cannot be denied. The form of their presentment to the Court, in this case, is a proof of it. "The Grand Jury *upon their oath* present, etc." Can it be pretended that if they were not sworn at all, the indictments presented by them would have any validity? Both reason and jurisprudence assert the contrary.—Crown Circuit Companion, Ed. of 1799, p. 18: "And then the Grand Jury are called in order, every one by his name, and when they appear they are sworn by the marshal.

The foreman by himself lays his hand on the book and the marshal administers to him the oath."

The form given is the same as that now in use, and is in the following words:—

"You, as foreman of this Grand Inquest, shall diligently enquire and true presentment make of all such matters and things as shall be given you in charge; the King's counsel, your fellows, and your own, you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unrepresented for fear, favour or affection, or hope of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding; so help you God." The rest of the jury, by three at a time, in order, are sworn in the following manner: "The same oath which your foreman hath taken on his part, you and everyone of you shall well and truly observe and keep on your part. So help you God."

Chitty Criminal Law, Vol. 1, p. 312, in stating the order of procedure in opening the term, says: "The Grand Jury are then called, who, having taken their places in the box assigned to them, are sworn by the Clerk of the Peace: first the foreman, and then the others, by three at a time, all laying their hands on the Gospel."

Archbold's Crim. Pleadings, p. 88: "The Grand Jurors must be sworn before they can find a bill of indictment laid before them. The form of oath is administered to the foreman. The other jurors take a similar oath."

"Every indictment must be found by a Grand Jury legally selected, duly constituted, and competent for the purpose." 10, Ency. of Pleading and Prac. p. 353, Vbo. 'Indictment': "The incompetency of one Grand Juror is sufficient to render the body illegal and findings by it void." Idem, p. 355, quoting statute 2, Henry IV., c. 9.: "Any indictment taken by a jury one of whom is unqualified shall be altogether void and of no effect."

"There is strong authority for the proposition that a Court has no jurisdiction to try a person upon an indictment found and returned by a Grand Jury consisting of fewer members than

the minimum number required by statute. If the indictment is not found by a legal Grand Jury, it is not found by a Grand Jury at all."—*Idem*, p. 371.

"The law clothes a defendant with the power of securing a lawful Grand Jury. As he is entitled to an impartial, unbiassed jury to try the indictment and to determine the question of his guilt or innocence, so it is equally his right to demand and to have a like jury to decide whether or not he shall be charged with crime."—4 *Crim. Law Magazine*, p. 175, and see the Canadian Criminal Code, art. 656.

In the face of these authorities there can be no doubt that the Grand Jury in the case under consideration was not validly and legally sworn, and, therefore, was not a sworn Grand Jury in any sense, and its presentments were, therefore, invalid and null. There might have been a plausible argument that the illegality had been waived, if the accused had pleaded to the indictment without objection and submitted to a trial, though, even in that case, it is contended by many authorities that no waiver would have availed against such a radical defect. See Archbold, p. 109: "When it has been made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the Court will quash it on motion by the defendant (even) after plea."

The second ground upon which the trial Court was asked to quash the indictment, viz., the admission of illegal proof before the Grand Jury, does not strike me as possessing equal force. A good deal of latitude is allowed to a Grand Jury as to the kind of evidence upon which its conclusions may be based. Of course illegal proof should not be admitted, but there is always a presumption that the proof submitted was legal, and that presumption is supported in the present case by the affidavit of the foreman that the depositions taken on the preliminary inquiry were not read, but that the principal witnesses whose names appeared on the back of the indictment were sworn and examined and that it was upon their evidence that the true bill was found.

The third objection—the failure of the foreman to initial the names of the witnesses examined, although at first appearing trivial, is, in reality, a serious one, especially when taken in connection with the presence before the Grand Jury of the depositions taken on the preliminary enquiry.

It illustrates the wisdom of the text of the Code, Art. 645, in requiring strict compliance with the stipulation that the foreman “shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment.” It is an indication to which the accused is entitled, as to the class of witnesses to be brought against him on his trial, and it is an important identification in case a charge of perjury is afterwards to be laid against them or any of them. See *Taschereau’s Criminal Code*, p. 733.

I am of opinion that upon the first and third points submitted to us in the reserved case, the indictment of the Grand Jury should have been annulled, that the accused should not have been put upon his trial, and, therefore, that the verdict rendered against him should be set aside. As all the members of the Court concur in this opinion, it becomes unnecessary to consider or adjudicate upon the question as to the admissibility of certain parol evidence received under objection at the time of the trial before the petty jury. It may not be presented in the same form, or at all, in the event of a new trial.

WURTELE, J.:—In this case two distinct objections have been urged for the quashing of the proceedings; the one relates to the constitution of the Grand Jury, and to the proceedings which were had before it, and the other relates to the admission of certain evidence at the trial on behalf of the prosecution.

When the term of the Court of King’s Bench, on its Crown side, for the District of St. Francis, was opened in October last, the grand jurors were called, and answered to their names, but were not placed when called in the box set apart for the Grand Jury. The grand juror selected as foreman was then called and was placed alone in the box and was sworn. At that time the

other grand jurors were either in the crowd of spectators or were in the hall. After the administration of the oath to the foreman, the other grand jurors were called and were placed in the box and were sworn in groups of three. When the case was submitted to the consideration of the Grand Jury the members of it desired to see certain exhibits which had been produced at the preliminary enquiry, and at their request the record of the preliminary proceedings, to which the exhibits were attached, was, by consent of the Court, laid before them, but it appears that the depositions taken at the preliminary enquiry were not used as evidence nor even examined. When the witnesses called before the Grand Jury were sworn and examined, the foreman neglected to write his initials against the name of each witness who had been so sworn and examined.

After the true bill found against the defendant was brought into Court, and before he was arraigned, a motion was made for the quashing of the indictment on the grounds, first, that the grand jurors had not been regularly sworn and that the Grand Jury had not been legally organized and constituted; secondly, that the production of the record of the preliminary enquiry was irregular; and, thirdly, that the foreman had neglected to write his initials against the names of the witnesses sworn and examined.

The regular manner to organize and constitute a Grand Jury is to call the grand jurors who have been summoned and place them in the box, and when they have been impanelled, to swear them, commencing first with the foreman, who is sworn alone, and then continuing with the other grand jurors by groups of three. This is the practice in England, as is mentioned in the work of Thompson & Merriam on Juries, sec. 589, and in my own experience of sixteen years in criminal courts it has been the uniform practice in this country, and, I may add, has always been the practice in this Province since the English criminal law was introduced.

In the formation of a Grand Jury there are two steps; there is, first, the impanelling, which consists of placing the grand

jurors in the box, and then, the organization and ultimate constitution of the Grand Jury, by the administration of the oath of office to the grand jurors. When both steps have been fulfilled the Grand Jury is constituted and can act. If, however, these requirements are not observed, the formation of the Grand Jury is illegal, and its proceedings are invalid and must be annulled on motion to the Court. It is necessary, for the proper and legal organization and constitution of a Grand Jury that all the jurors should be qualified. It requires the concurrence of seven grand jurors to find a true bill, and, if one of the seven should happen to be a person not entitled to act, the finding would not be found by the requisite number, and would be illegal, and, consequently, the defendant would not have the legal trial to which he has a right. All persons committed for trial are entitled to have their case submitted to a jury so composed, and the presence of a person who is not qualified vitiates the formation of the Grand Jury and renders its proceedings illegal. The law respecting juries declares what persons are disqualified to act as such, and it also establishes certain exemptions; but there is a difference between disqualification and exemption. The person who is disqualified cannot act as a juror, while the person who has the benefit of exemption has the privilege of claiming it but can act if he chooses. Persons who have been indicted can object to a grand juror who is disqualified by motion to quash, but have no right to invoke the exemption of such persons. Persons who have not the necessary property qualification, who are under the age of 21 years, who are afflicted with physical or mental infirmity incompatible with the discharge of the duty of a juror, who are under arrest, or under bail upon a charge of treason or felony, or who have been convicted thereof, and aliens are disqualified. It is, therefore, important that the persons summoned as grand jurors should be placed in the box some time before being sworn, in order that time be allowed to recognize them, and that at the proper time an objection may be made respecting their qualification. The plea in abatement has been abolished, but it is provided by section 656 of the Criminal Code, that any objection to

the constitution of a Grand Jury may be taken by motion, and that an indictment may be quashed if the Court is of opinion both that the objection is well founded, and that the accused has suffered or may suffer prejudice thereby. The objection to the organization and constitution of the Grand Jury was therefore legally laid before the Court by the motion to quash, and the formation of the Grand Jury was shewn to have been contrary to practice, and to have been irregular and illegal; and as the accusation against the defendant was submitted to an illegal Grand Jury, of which the findings and presentments were illegal, invalid and void, and as he therefore suffered prejudice from the illegal process followed, the Court had the power to quash the indictment, and should have done so.

The objection to the constitution of the Grand Jury must, however, be made before a verdict is rendered by the petit jury. In the present case the objection was made before the arraignment of the defendant on the indictment which had been found against him.

Under the circumstances I am of opinion that the organization and constitution of the Grand Jury was irregular, for the first reason of the objection, which is that the Grand Jury was improperly and illegally impanelled and sworn; that its proceedings were null and void; that the objection was made in due time, and that the motion for the quashing of the indictment should have been granted.

With respect to the second reason, it is clear that the evidence submitted to a Grand Jury must be legal evidence. Depositions taken at the preliminary inquiry can only be read to a Grand Jury in cases where such depositions can be used as evidence before a petit jury, and read to it. In the present case, however, it appears that the depositions taken at the preliminary inquiry were not taken in communication of by the Grand Jury, and that the exhibits were only used for the purpose of elucidating and testing the oral testimony of the witnesses who were examined. There was, therefore, no violation of the rule which requires that all evidence given before the Grand Jury should be legal evi-

dence. It was urged that the documents thus produced were not duly certified, but as they were not produced to establish any responsibility, but merely for the purpose of elucidation, they were properly produced and made use of. This ground, therefore, fails.

Article 645 of the Criminal Code provides that the foreman of a Grand Jury shall write his initials against the name of every witness whose name is endorsed on the bill of indictment, and who has been sworn and examined. In the present case the foreman omitted to do so. This formality is one in which the accused person has an interest, as by reason of the initialing, he knows upon the evidence of whom of the witnesses the Grand Jury have found a true bill against him. The terms used, which are that he "shall write his initials," are mandatory and imperative, and are not merely discretionary and permissive. It is the imperative duty of the foreman to place his initials against the name of every witness sworn and examined as enjoined by the statute, as it is mandatory and not merely directory. A disregard of this requirement is a sufficient ground, upon a proper motion being made, for the quashing of the indictment. The prisoner in the case of such an omission has the right before plea to ask that the indictment be sent back to the Grand Jury, with a direction to the foreman to so initial the names of the witnesses sworn and examined. If, however, the Grand Jury has been discharged before a motion has been made to send the indictment back to it, the indictment must then be quashed in consequence of the disregard of the requisite of the law. In stating this I am merely following the opinion expressed by the present learned and eminent Chief Justice of the Supreme Court of Canada, the Hon. Sir Elzear Taschereau, as laid down in his commentaries on the Criminal Code on pages 733-734. In this case the Grand Jury had been discharged when the motion was made, and I am of opinion that for the third reason of the first objection the indictment must be quashed.

I concur, therefore, entirely in the views expressed by my learned colleague, Mr Justice Hall, and I am of opinion that in

consequence of the irregular and illegal organization and constitution of the Grand Jury, and of the disregard of the formality with respect to initialing, the indictment and all subsequent proceedings must be quashed.

It is therefore unnecessary to say anything concerning the question of law raised as to the admissibility of certain evidence at the trial, as the indictment itself on which the trial took place must be quashed.

Indictment quashed.

Note:—Grand jury—Swearing witnesses.

The ancient practice in regard to witnesses before a grand jury was to swear such witnesses in open court instead of in the presence of the grand jurors. 20 J.P. 481. The grand jury had, at the time the evidence was taken, no other means of knowing whether the witnesses had or had not been sworn than by inquiry of the witnesses themselves. This was changed in England by the statute 19 & 20 Vict. (Imp.) ch. 54, which empowered and required the foreman of every grand jury to "administer an oath to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment," and which also expressly dispensed with the necessity for swearing the witnesses in open court. The same statute provided that:—

"The name of every witness examined or intended to be so examined shall be endorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment."

A bill of indictment found on the testimony of a witness not duly sworn will be quashed. *R. v. Bitton*, 6 C. & P. 92. But an objection made after conviction that the indictment was found on unsworn testimony is too late: *Rez v. Dickinson*, Russ. & R. 401. And in North Carolina such an objection has been held to be too late when taken after a plea of not guilty. *State v. Sheppard*, 97 N.C. 401.

Grand Jury—What evidence receivable.

The prevailing rule in the United States seems to be that rumour, heresy, public clamour or newspaper articles will not justify an indictment. 28 L.R.A. 323 (xiv.); 3 Pittsb. 174; *Re Charge to Grand Jury* (No. 3), vol. 62 Fed. Rep. 840, 4 Insters. Com. Rep. 784. And in Minnesota and Montana it is provided by statute that none but legal evidence shall be received by a grand jury. *State v. Beebe*, 17 Minn. 241; *Territory v. Pendry*, 9 Mont. 67.

In a British Columbia case, where the grand jury reported that without the evidence of an absent witness they had no material upon which to find

Note—Continued.

Grand jury—What evidence receivable.

a bill, Crease, J., held that they were entitled to peruse the depositions without proof that the witness was absent from Canada or was too ill to travel. *Regina v. Howes* (1886), 1 B.C.R., pt. 2, p. 307.

In *Regina v. Bullard* (1872), 12 Cox 353, a bill of indictment had been presented to the grand jury against Bullard for unlawful wounding. The foreman of the grand jury came into Court, before Byles, J., presiding at the Suffolk Assizes, and asked for the deposition of an absent witness, without whose evidence they had no materials to find a bill. Byles, J., granted the application, and stated that "the grand jury were not bound by any rules of evidence. They were a secret tribunal, and might lay by the heels in jail the most powerful man in the county by finding a bill against him, and for that purpose might even read a paragraph from a newspaper."

And in *R. v. Gerrans* (1876), 13 Cox C.C. 158, Denman, J., presiding at the Hampshire Assizes, held, upon an application made on the part of the prosecution to send up the deposition of an absent witness to the grand jury, that the grand jury were entitled to look at and to act upon the deposition if they thought proper, without any preliminary proof that the witness was ill or that the deposition had been regularly taken in conformity with 11-12 Viet. (Imp.) ch. 42, sec. 17.

But in a Quebec case, in which both of these English cases were cited, the opposite view was taken. In *Regina v. Carbray* (1887), 13 Quebec Law Reports, p. 100, it was held by Sir A. A. Dorion, C.J., presiding at a trial sittings of the Court of Queen's Bench, Crown Side, that affidavits taken before a magistrate on the application for the warrant to apprehend the accused, could not be used as evidence before the grand jury in the absence of the deponents. The Chief Justice stated that the depositions were not admissible, having been taken out of the presence of the person accused, and without his having had an opportunity of cross-examining the deponents. R.S.C. ch. 174, sec. 222. He would not follow the decision in *R. v. Bullard*, 12 Cox 353, and referred to the observation of Byles, J., above quoted, as an extraordinary one. 13 Que. L.R. 101.

[COUNTY COURT FOR DISTRICT NO. 2, NOVA SCOTIA.]

BEFORE HIS HONOR F. G. FORBES, COUNTY JUDGE.

THE KING v. CHANDLER.

Fisheries—Provincial foreshore limits—Dominion license for exclusive rights invalid—Federal regulation of fisheries—"Trap net" defined—Sub-sec. 7 of sec. 14 of The Fisheries Act (Can.) ultra vires—R.S.C. 1886, ch. 95.

1. A fishing net having the usual accessories of a trap net, except that it has not a twine floor or bottom, is none the less a "trap net" within the meaning of The Fisheries Act (Can.).
2. The Dominion Government has no authority to demand a license fee from fishermen for the exclusive right to set nets or traps within certain limits of Provincial foreshore waters, and sub-sec. 7 of sec. 14 of The Fisheries Act, R.S.C. 1886, ch. 95, is consequently ultra vires.
3. The Dominion Fishery officers have the right to regulate the kinds of nets and traps to be used in the Provincial foreshores and to control the manner of fishing, but without compelling the payment of a license fee.
4. A special statutory provision would be necessary to authorize the imposition by the Dominion of a license fee upon fishermen operating in Provincial waters if imposed under the federal power of so raising a revenue for the general purposes of Canada.

DECIDED: March 5, 1903.

Appeal from a summary conviction of the defendant by L. S. Ford, Inspector of Fisheries for Fishery District No. 3 in the Province of Nova Scotia, and a justice of the peace ex officio, for that he the said "William Chandler at or near Fox Point in St. Margarets Bay in the county and Province aforesaid, did in the month of July, 1902, use a trap net for capturing deep sea fish, other than salmon, without having a license then in force, contrary to the provisions of sub-sec. 7, sec. 14 of 'The Fisheries Act,' cap. 95, R.S.C." and was fined \$5.00 and costs.

That sub-section is as follows:—" (7). No one shall use a bag-net, trap-net, or fish-pound, except under a special license granted for capturing deep-sea fish other than salmon."

The two principal grounds relied on in support of the appeal were:—

(1). That the net used by him was not a "trap net" within the meaning of the Act, and

(2). That the Dominion or Federal Government has no power to issue a license and demand a fee therefor and to give the exclusive right of fishery over territory owned by the Provincial Government; but they may issue licenses to fish over territory owned by themselves and collect a tax therefor.

A. K. Maclean, for Crown.

F. B. Wade, K.C., and *J. A. Maclean*, K.C., for the defendant.

LIVERPOOL, N.S., March 5, 1903.

FORBES, Co. J.:—As to the contention that the net used in the shape it was by the defendant at the time complained of was not a trap-net, I must be guided by the evidence and the ordinary rules of interpretation. Section 14, sub-sec. 7, ch. 95, says: "No one shall use a bag net, *trap net*, etc." It was proven on the trial distinctly that the defendant had a lengthy fine twine seine which he placed in shoal waters or coastal waters in a circular position resembling a heart in shape when set, and from one lobe of the net so set a long leader or straight net of fine twine was stretched towards the nearest shore. The object being to direct the schools of deep sea fish, as mackerel, which in passing along the shore meet this leader, into the centre of the heart formed by the net, then a net is stretched across the small opening and the fish are locked in, being completely surrounded by a fence of fine twine netting, they are then "spilled" out at the pleasure of the fisherman; barring accidents, such as the lifting of the foot ropes or sinking of the cork ropes, the fish are completely entrapped. It appears that it is only about 18 years since the Fishery officers have called these nets so set as above described 'trap-nets' and demanded a license and fee therefor. The fee is collected according to the length of the leader, but is never less than \$10.00, and on a leader from 20 to 30 fathoms the fee is \$20.00, and from 30 to 40 fathoms the fee is \$30.00

and so on. L. S. Ford, the Inspector, described a regular fish trap set with walls of twine fixed on poles and anchored to large rocks, and generally such a trap has a twine floor. The defendant's witnesses, 5 or 6 in number, agreed with the Inspector that his description was correct or gave the same description of a trap themselves, and all of them professed to hold that a trap must have a bottom. The defendant Chandler, an old fisherman of experience and 65 years of age swore, "The fishery officers were the first people to call these seines traps, and the point has been more or less disputed by some fishermen, and by others admitted that they were traps, and the license fee paid for the exclusive use of the waters reserved in the license, and for the last 18 years the device or seine set as mine was set was called a trap, and I and others for 18 years have got licenses to set our seines as traps."

It is evident from the testimony given and the argument of counsel that the fishermen should not be estopped from denying that the device used was a "trap net," because it was established that the sole and exclusive privilege of netting off a particular piece of foreshore or in a reserved piece of water was the object for which the fisherman took the license, and they could not get this exclusive privilege without signing the form of application supplied by the fishery officers in which the phrase "trap net" occurred.

I fail to see either from the evidence given or argument made that a net bottom is a distinct feature of a trap net. Chandler and others also swore that "the foot of the net sets on the bottom of the sea but does not fill up the uneven spaces of the bottom. This seine is over 100 fathoms long and over 12 fathoms deep; another piece of net or twine is used as a leader. My leader was 30 fathoms, I could fasten one end to the shore and string it out 100 fathoms, and it would require no license nor be a trap. Again, a neighbor of mine got 400 barrels of mackerel in a seine or in the bowl of the seine set as mine was set, some years ago. They would not have been caught except for the bowl of the net. These fish were not meshed. Had the

net been set in a straight line the fish could only have been caught by meshing." It is undoubtedly the fact that the fish are directed into a net bowl and there entrapped, and by the use of a small net the opening is locked or closed, and I cannot doubt but that such a device is a trap or trap net, and I so find the one set by the defendant to have been.

As to the other point argued for defendant by F. B. Wade, K.C., and J. A. Maclean, K.C., that the Dominion Government has no power to issue licenses to give the exclusive right of fishery over specific territory owned by the Provincial Government of Nova Scotia. The evidence was as follows: "I own the fore-shore opposite the place where the seine or trap was set." Deeds J. & K. were signed in my presence, tendered and received. "The nearest end of the leader was not over 100 yards from low water mark, etc., etc., my leader was 30 fathoms." This evidence shews the trap and leader to have been set inside the fore-shore limits, which are without doubt the proprietary rights of the Provinces.

In the case of *The Attorney-General of Canada v. The Attornies-General for the Provinces*, 18 App. Cas. p. 712, Lord Herschell said:

"Their Lordships are of the opinion that section 91 of B.N.A. Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, 'Sea coast and Inland Fisheries' in section 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the Provinces respectively remained untouched by that enactment."

Such being the law, has the Dominion Government in requiring a license to be taken by fishermen by sec. 14, sub-sec. 7, and in laying this information for not taking the same trespassed on the proprietary rights of the Province of Nova Scotia? I am

strongly of the opinion that it has invaded the domain of rights solely within the Province's jurisdiction.

Section 4, ch. 95, says as follows: "The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situated or carried on, etc."

In the same 18 App. Cas. p. 714, it was held

"That in so far as section 4 of the R.S.C. ch. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the Provinces, it was not within the jurisdiction of the Dominion Parliament to pass it, and the subsidiary provisions in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall within the principal enactment."

Section 14, sub-sec. 7, was intended to enforce the right taken by the Dominion Parliament under sec. 14, ch. 95, which sec. 4 is held *ultra vires*, and consequently sec. 14, sub-sec. 7, is *ultra vires*. But it was strongly contended and argued by Mr. A. K. Maclean, Counsel for the Crown, that since sec. 14, sub-section 7, did not exercise an exclusive right, because lobster and eel pots or salmon pots might be set without a license on same territory, therefore it was not actually *ultra vires*, and besides that sub-sec. 7 was merely a "regulation" controlling the manner of fishing which is undoubtedly within the jurisdiction of the Dominion. I think most undoubtedly that the Dominion Parliament intended, and by its officers did exercise the exclusive right to control the fisheries in the foreshores and where this defendant wished to set his trap net, and the same Dominion Government by its officers claimed the right to collect a fee for the licensing of a proprietary or exclusive right and not for the purpose of "regulation," etc., etc. I think the Dominion Government could tax the fishermen for a license for the purpose of raising a revenue, and I find in the Privy Council appeal afore mentioned that their Lordships held as follows:—

“In addition, however, to the legislative power conferred by the 12th item of section 91 of the British North America Act, the 3rd item conferred upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within the power the provision of imposing a tax by way of a license as a condition of the right to fish.”

It is not contended nor was any evidence submitted that the fee demanded in this case was for the purpose of raising a revenue for the general purposes of Canada, and, besides, I do not think it could be imposed or collected without a special Act or statutory provision being first passed.

And further, it is beyond contention and practically admitted that the license demanded of the defendant Chandler and all similar licenses are demanded by virtue of sec. 14, sub-sec. 7, of R.S.C. ch. 95, and by virtue of the exercise of an alleged exclusive right to control the fisheries in the Provincial foreshores and not under any regulation made or published by the Department of Marine and Fisheries for controlling the manner of fishing, which regulations would be undoubtedly within the competence of the Dominion Parliament. Hence, I am compelled to find that the Dominion Government has no power or authority to refuse a fisherman the right to set his net or trap in Provincial waters unless he first takes out a license which entails the payment of a fee therefor, and it therefore follows that the conviction made herein at Mahone Bay in the county of Lunenburg on the 29th of August, 1902, by L. S. Ford, Inspector of Fisheries, etc., etc., is illegal, and I set it aside and direct judgment for the defendant.

I think the right to set the various kinds of nets and traps and the places and times where they shall be set can satisfactorily be controlled and regulated by the Fishery officers at present so that any person can feel sure of his berth and have the full protection of the officers of the Marine and Fisheries Department and be within the law. If the officers allot to the application their several berths in any fair manner the officers determine and define

as in a license the allotted territory, keeping any and all others off one-eighth of a mile or any distance as at present, but not demanding any fee or compelling any license therefor. This would be the carrying out of regulations either verbal or written for controlling the manner of fishing, which is within the plenary powers of the Department and its officers.

Conviction set aside.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF QUEBEC.

BEFORE BLANCHET, J., IN CHAMBERS.

PAQUET v. LAVOIE.

Civil remedy for criminal act—Suspension of, until after criminal prosecution—Constitutionality of Code section 534—Introduction of English criminal law in Quebec—Incident modification of civil rights as in England—Quebec Act, 14 Geo. III. (Imp.) c. 83, s. 11—Crim. Code secs. 534, 865, 866.

1. Section 534 of the Criminal Code, which provides that no civil remedy for any act or omission shall be suspended or affected by reason of the same amounting to a criminal offence, is not "criminal law" legislation but legislation dealing with civil rights and is ultra vires of the Federal Parliament.
2. *Semble*, the establishment of the English criminal law by the Quebec Act (14 Geo. III. (Imp.) c. 83) in the Provinces of Ontario and Quebec having been effected by a legislative body having absolute jurisdiction over both civil and criminal law, it must be taken as having introduced in the Province of Quebec the English law with respect to the suspension of civil remedies for criminal wrongs.

¶

QUEBEC, April 14th, 1898.

(Translation.)

BLANCHET, J.:—The claim which is made on this appeal raises a very important question of law.

In February last the grand jury found a true bill against the defendant on a charge of theft, and he has pleaded "not guilty."

The trial was postponed until the next term, owing to the absence of a second panel, and the defendant was admitted to bail.

He is now being sued in a civil action brought to recover the sum stolen, and, filing a demurrer, he has obtained an order of the Superior Court staying all proceedings in this civil action until he shall have undergone the criminal trial, on the ground that he might be seriously prejudiced if he were now forced to disclose his defence and evidence before the civil tribunal.

The plaintiff asks leave to appeal from that decision and he claims:—

(1) That the defendant fails to prove any prejudice other than what he pretends to have shewn by his own affidavit, and that no other proof has been advanced in support of such claim.

(2) That if the defendant succeeds in having the civil suit dismissed, he is not hurt, and that if judgment goes against him, he can scarcely hope for a better result with a jury; that the next term of the Criminal Court will not be held until the month of October, and that in the interval the witnesses may get out of the way or become incompetent, and that to avoid these and similar difficulties, the Criminal Code has expressly declared, in section 534, that after the date when it comes into force, “no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.”

The defendant replies with the ancient maxim “*Le criminel tient le civil en état*,” and contends:—

(1) That section 534, which constitutes a rule of procedure for civil actions, is unconstitutional and ultra vires in so far as the Province of Quebec is concerned, and that even supposing it to be intra vires, it is evident from the text itself that it does not apply to a case where it is discovered in the course of a civil suit that the act with which the defendant is charged constitutes a criminal offence, and that the civil remedy could be neither affected nor suspended in that case by criminal proceedings subsequently taken.

(2) That if the defendant when called as a witness refused to answer, as he is entitled to do, before the civil tribunal, or if judgment were improperly awarded against him and his criminal trial took place before he could carry the judgment to appeal, a serious prejudice would arise against him in public opinion, and this would influence the jury.

(3) That in all cases it is a question of discretion, the exercise of which is subject neither to revision nor to appeal. The plaintiff replies that the criminal law is a matter affecting the rights of the public, and that the Federal Parliament having exclusive jurisdiction over the matter, have power to declare, as they had done, that thereafter a criminal proceeding should not have the effect of suspending or affecting a civil proceeding brought for the same cause.

Section 534 appears to me to establish a general and absolute rule which would apply not only where in the course of a civil trial it is discovered that the wrong in question constitutes a criminal offence, but also to a case where criminal proceedings either precede or follow the institution of civil proceedings for the same cause. The literal meaning of the words "shall be suspended or affected" is applicable to the word "remedy." The former indicates that it is operative where the civil action has already been started, and the latter to civil proceedings not yet begun.

On referring to the English authorities one finds that it has been a long established rule that in case of felony a civil proceeding was not allowed against the criminal before the complainant had fulfilled the public duty of prosecuting such criminal in the criminal courts "in order that the justice of the country may be firstly satisfied in respect of the public offence." Lord Ellenborough in *Crosby v. Leng*, 12 East 413.

Many subsequent decisions having withdrawn certain criminal offences from the operation of this rule, the courts after much hesitation, set it aside in the case of other criminal offences, principally because of its difficult application, as it was necessary

for the defendant to himself plead and prove his own felony, whereupon the Court took upon itself to intervene and to suspend the proceedings.

The Commissioners appointed to compile a criminal code for England in 1880 adopted this last view as the expression of the law which was then in force, and from that the new rule was transferred into the Criminal Code of Canada of 1892. It is plain that it must be given the same meaning and effect as it had acquired in English jurisprudence, that is to say, that the two remedies are completely independent of each other and may be exercised simultaneously. In this view an appeal should be permitted on the ground that the judgment to be appealed against seems to be contrary to law.

Again, can the Federal Parliament introduce into the Criminal Code a rule which will be binding upon the civil tribunals of this Province?

The plaintiff upholds the affirmative, claiming that it is a matter concerning public rights over which the Federal Parliament alone has jurisdiction, and that it has the same right to enact that the civil remedy shall not be affected or suspended as to declare that the circumstances which give rise to it shall constitute a criminal offence; and that such is a necessary incident or consequence of the latter. But the plaintiff forgets that although in legislating upon bills of exchange and bankruptcy, the Federal Parliament can as a necessary consequence establish certain rules which affect or modify civil rights over which it would otherwise have no jurisdiction, there is nothing here to justify a similar interference, for the object does not appear to have been for the benefit of the Crown, much less was it for the protection of the accused.

It cannot be considered as a necessary incident or consequence of the right to legislate upon criminal matters of which it is completely independent, and I have not found any ground which can be seriously considered as supporting the claim of *intra vires*.

The most eminent jurists of the Federal Parliament seem to have been of the same opinion.

At the time of the debate upon the Code before the Parliamentary Committee, Mr. Mills, the member for Bothwell, asked if the section were necessary. He added that in England, where the same legislature had jurisdiction over both civil and criminal matters, the rule would be easy to apply; but that in a country where the Provinces had exclusive control of civil rights, and the Federal Parliament over the Criminal Law, there was room to doubt whether the Federal Parliament had power to pass this section, particularly as it was not a civil right incident to legislation over which it had absolute control, such as bills of exchange.

Sir John Thompson, who followed, replied that the assent of two legislatures would be necessary to give effect to this rule, and he added: "We had better pass the section and leave to the local legislatures the duty of perfecting it. We are giving our consent to the legislation which they ought to pass on this subject."

Our legislature having neither assented to nor adopted this rule, we have to fall back upon the law prior to the Criminal Code. Before the cession of this country the civil and criminal business of the courts was usually taken up at the same time.

Pothier, on "Criminal Procedure," says that the accusation by the public officer sometimes precedes that of the civil party, in which case the civil party intervenes when the Judge so desires. If the civil party has taken proceedings prior to the public officer, then, on notice being given to him by the Judge's direction of the complaint laid by the civil party, the public officer intervenes and joins in the prosecution. Very often the wronged party leaves it for the public officer to take action and does not himself lay any complaint, thus avoiding the expense of the proceeding.

Bernier, Ord. of 1673, chap. 3, art. 8, p.66.

There remains, however, one exception: that is when the two actions lead to the same end, in which case the choice of the one excludes the other.

The Ordinance of 1667, chap. 18, art. 2, contains an express provision on this point as to the action necessarily possessing that

result in point of fact. Ferrière, Dict. de Droit, verbo "Actions Civiles et Actions Criminelles."

The Judges had, also, the power to turn a criminal cause into a civil cause—that is to say, to change into a common civil process the more severe criminal process, upon condition always of resuming the latter if the matter were so ordered. Chap. 20, Ord. of 1673. Ferrière, Dict. de Droit, vo. "Civiliser."

This procedure, disused since the cession, is without doubt not in force since the introduction of the English Criminal Law in this country by the Act of 1774. 14 Geo. III. chap. 83.

At that time, in England, they did not allow the party who prosecuted a charge of felony to have recourse to civil law before the accused had taken his criminal trial.

Crémazie, in his work on Criminal Law, p. 130, says:—"In matters of treason and felony, the complainant cannot have civil process before prosecuting criminally. But in the case of misdemeanour, the complainant can, at his option, proceed either by civil action or by indictment.

"Nevertheless," he adds, "it is preferable not to take civil proceedings until the criminal action is finished."

I find in the third volume of "La Revue de Legislation," p. 363, a case of *Fortier v. Mercier*, decided in 1847, which was five years after the publication of Crémazies' work, in which the Court of Queen's Bench stayed the proceedings in a civil case, in which the defendant, after having been examined "sur faits et articles," was immediately proceeded against under the criminal law for perjury and a true bill found by the Grand Jury, after which he would have to undergo his trial before the Petit Jury.

Judge Duval, before 1860, in a case not reported (*Reg. v. Doran*), put off a trial for a serious offence in the Criminal Court until the civil action brought for the same cause should be decided.

The appellant may, perhaps, recall that another provision of the Criminal Code, but which is much older than the Code, also affects civil rights.

In effect, articles 865 and 866 declare that if the accused per-

son, upon a hearing upon the merits of any case of assault or battery, obtains a certificate of the dismissal of this complaint, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment awarded, then such person shall be released from all further or other proceedings, civil or criminal, for the same cause.

But this enactment, introduced in our Statutes by 4 and 5 Vict. ch. 27, s. 28, goes back to a period when the Parliament of the united provinces of Upper and Lower Canada had jurisdiction over both civil and criminal legislation.

It was the same in 1774; and the Legislature, in declaring that the criminal laws, as then administered in England, should be followed in this country, changed in consequence our civil rights on the point in question, because they had absolute and entire jurisdiction over both the civil and criminal law. Then, if we are required to follow and adopt the rule then in force in England, the application would have to be refused, because the judgment would be well founded.

But, as the question is of great importance and as it involves the constitutionality of a Canadian law, I will grant the leave, so as to give the Minister of Justice the opportunity of being heard before the full court. (Art. 114 C.C.P.)

Leave to appeal granted.

Malouin, Bedard & Dechène, for appellant.

Drouin, Pelletier & Fiset, for the respondent.

N.B.—The appeal for which leave was granted, *supra*, was not prosecuted.

Note: Criminal law as affecting civil rights—Cr. Code s. 534.

The former rule, excepting in the Province of Quebec, was that on grounds of public policy if it appeared on the trial of a civil action that the facts amounted to felony, the judge was bound to stop the civil proceedings and non-suit the plaintiff in order that public justice might first be vindicated by a criminal prosecution. *Walsh v. Nattress*, 19 U.C.C.P. 453; *Livingstone v. Massey*, 23 U.C.Q.B. 156; *Williams v. Robinson*, 20 U.C.C.P.

*Note—Continued.**Criminal law as affecting civil rights—Cr. Code s. 534.*

255; *Pease v. McAloon*, 1 Kerr (N.B.) 111. The civil remedy was held to be suspended until the defendant charged with the felony should be either acquitted or convicted thereof. *Brown v. Dalby*, 7 U.C.Q.B. 162.

The reason for the rule was that the criminal justice of the country should not be defeated. *Crosby v. Leng* (1810) 12 East 413, 11 Revised Reports 437; *Edwards v. Kerr*, 13 U.C.C.P. 25. That rule is now abrogated by the enactment of sec. 534 of the Criminal Code declaring that "no civil "remedy for any act or omission shall be suspended or affected by reason "that such act or omission amounts to a criminal offence." The rule laid down by the Code may be equally founded upon a belief that the administration of criminal justice will be better served by the retention of the civil remedy against the offender. Section 534 probably means no more than that any redress which the civil law may give in respect of the criminal act or omission shall not be suspended or affected because of a crime being included therein, having reference to the civil remedy which may be existent under provincial laws at the time of the criminal offence.

The section does not purport to continue in force the same civil remedies for criminal wrongs as were available at the time when the Criminal Code of 1892 came into force. The nature of such remedies is still left with the provincial legislatures to deal with under their jurisdiction respecting "property and civil rights" conferred by the British North America Act. It is, however, a question whether the Dominion Parliament exercising sole legislative powers respecting "the criminal law" might not by express enactment confer a right of action in favor of the wronged party in any case where the wrong constituted a crime, as an additional mode of punishing the wrong doer, and whether such an enactment would not override a provincial law abolishing or restricting such actions.

It was held in *Doyle v. Bell* (1884) 11 Ont. App. R. 326, by the Ontario Court of Appeal that the jurisdiction of the provincial legislature over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover by a civil action a penalty imposed as a punishment for bribery at an election. The statute there in question was the Dominion Election Act 1874, 37 Vict., c. 9, s. 109 of which provided that all penalties and forfeitures (other than fines in cases of misdemeanor) imposed by the Act shall be recoverable with full costs of suit by any person who will sue for the same, by action of debt or information in any of Her Majesty's Courts in the province in which the case of action arose having competent jurisdiction. This enactment was held to be valid by the unanimous decision of the court (Hagarty, C.J.O., Patterson and Morrison, J.J.A., and Rose, J., *ad hoc*).

Hagarty, C.J.O., (p. 327) said :

"It can hardly be said that it is a civil right in the defendant to commit bribery, but it is urged that a civil right is involved in making him liable to pay money to another person in a civil action. I think this is a strained and unnatural construction."

Note—Continued.*Criminal law as affecting civil rights—Cr. Code s. 534.*

Patterson, J.A., thought the provision was one which "can reasonably be assumed to have been in the contemplation of the Imperial Legislature as accompanying the right given, whether by express terms or by necessary implication to the several provinces and to the Dominion respectively, to regulate the election of members of their respective legislatures."

Rose, J., in the same case (page 334), said :

"It clearly appears from the decisions in *Valin v. Langlois*, 3 Can. S.C.R. 1, and *Peek v. Shields*, 6 Can. S.C.R. 639, and cases therein referred to, that as to subjects within the exclusive jurisdiction of the Dominion Parliament, that parliament has the power to make such enactments as are necessary, whether the same interfere with civil rights or not and also the power to provide all necessary procedure to be adopted to enforce such rights. . . . I do not understand by the use of the word 'necessary,' as found in various decisions and text books, that it is meant to lay down the doctrine that to bring within the powers of the Dominion legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such legislature and which provision might affect civil rights, it must necessarily appear that without such provision it would be impossible to carry into effect the intentions of the legislature or that probably no other provision would be adequate. On the contrary, it seems to me that if such provision might, under certain circumstances, be beneficial and assist to more fully enforce such legislation, then it must, at all events, on an appeal to the courts, be held to be 'necessary'—that is, necessary in certain events."

[COUNTY COURT, DISTRICT NO. 4, NOVA SCOTIA.]

BEFORE HIS HONOUR J. P. CHIPMAN, COUNTY JUDGE.

THE KING v. WALLACE.

Evidence—Wife as witness against her husband—Husband's statement made in presence of wife and another—Incompetency to disclose communication made during marriage—Canada Evidence Act, 1893, sec. 4.

1. A wife, called as a witness against her husband, is incompetent under the Canada Evidence Act to disclose a communication made by her husband in the presence or hearing of herself and a third party which she will not undertake to say was not intended for her to hear.

DECIDED: January, 1903.

THE accused was on trial upon a charge of arson and the prosecution called the wife of the accused to give evidence against her husband.

Section 4 of the Canada Evidence Act, 1893, makes the following provision:—

“Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.”

The prosecution proposed to offer a communication made by the prisoner to another person, and which was overheard by the wife. One or two questions elicited the fact that the wife was

near by and would not undertake to say to whom the communication was intended, whether to her, or to the third party then in the room.

KENTVILLE, N.S., January, 1903.

CHIPMAN, Co.J.:—Such a communication, i.e., any communication made by the husband in the *presence* or *hearing* of the wife could not be given in evidence under the statute by the wife against her husband for the reason that neither the wife nor any one but the husband could say whether it was not really intended for a communication to the wife. Possibly the third party might clear up the difficulty by shewing that the prisoner's remark was made to him without the husband knowing that the wife was within hearing distance. The third party, I assume, could prove the communication.

Evidence rejected.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE, AND STREET, JJ.

THE QUEEN v. VERRAL.

Foreign commission—Order for while preliminary enquiry pending—Evidence under commission admissible on preliminary enquiry—Return of commission—Practice—Crim. Code, secs. 681, 683.

1. A commission to take evidence in a foreign country for use upon a prosecution for an indictable offence may be ordered under Code section 683 while the preliminary enquiry is pending.
2. The evidence taken under commission is admissible as well at the preliminary enquiry as before the grand jury and at the trial of the indictment when found.
3. The order should provide for the return of the commission into the Court from which it issues and should not direct a transmission of the evidence by the commissioner to the magistrate holding the preliminary enquiry.

ARGUED: November 29, 1895.

DECIDED: December 14, 1895.

APPEAL by the defendant from the order of MacMahon, J., in Chambers, allowing the Crown to issue a foreign commission to take the evidence of one Otto E. C. Guelich, at the City of Detroit, in the State of Michigan, for use upon the preliminary hearing before the Police Magistrate for the City of Toronto of a charge against the defendant of an indictable offence under section 136 of the Criminal Code.

The order, as issued, provided that the commission and depositions taken under it should be transmitted by the commissioner to the Police Magistrate, and should be admitted to be read and given in evidence at the investigation before him.

TORONTO, November 29, 1895.

Biggs, Q.C., for the defendant.

J. W. Curry, for the Crown.

TORONTO, December 14, 1895.

The judgment of the Court was delivered by

ARMOUR, C.J.:—Section 683 of the Criminal Code is merely an extension of the provision made by section 681 for procuring the evidence of a person dangerously ill and not likely to recover from such illness, to the procuring of the evidence of a person residing out of Canada, and it is desirable, therefore to shew the origin of section 681 in order to ascertain the proper application of section 683.

Section 681 had its origin in 43 Vict. ch. 35, the preamble of which was as follows:—

“Whereas it may happen that a person dangerously ill and unable to travel may be able to give material and important information relating to an indictable offence, or to a person accused thereof; and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same.”

Reading then the provisions of section 681 in the light of this preamble, it is clear that the statement for the taking of which provision is therein made may be used at any stage of the inquiry relating to an indictable offence as evidence relating to such offence, or relating to any person accused of any such offence.

Such statement, if it relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, is to be transmitted to the proper officer of the Court at which such accused person is to be tried; and in every other case is to be transmitted to the clerk of the peace of the county, division or city in which it has been taken, or to such other officer as has charge of the records and proceedings of a Superior Court of criminal jurisdiction in such county, division or city, and such clerk of the peace or other officer is to preserve the same and file it of record, and upon the order of the Court or of a judge is to transmit the same to the proper officer of the Court where the same shall be required to be used as evidence.

Section 683, as amended by 58 & 59 Vict. ch. 40, reads as follows:—

“Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any Superior Court, or the judge of a County Court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of Court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective Courts in connection with like matters in civil causes.

3. The depositions taken by such commissioners may be used as evidence as well before the grand jury as at the trial.”

The time at which an order may be applied for under section 683 does not differ from the time at which an order may be applied for under section 681. Under the former it is whenever it is made to appear, at the instance of the Crown or of the prisoner or defendant, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence; and under the latter it is whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give

material information relating to any indictable offence, or relating to any person accused of such offence.

The evidence to be given in the former case is of a person who is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence; and in the latter of a person who is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence.

The kind of evidence to be given in each case is substantially the same; it must relate to an indictable offence, or to any person accused of such offence; and the words "for which a prosecution is pending" do not, in my opinion, differ section 683 from section 681.

The order in this case, made under section 683, was, in my opinion, applied for and obtained at a proper time, and under circumstances warranting the application for and obtaining it.

The use to be made of the evidence to be procured under it cannot at all affect the validity of the order for procuring it. We think, however, that it may be used in the same manner and at the same times as evidence may be used procured under an order under section 681.

The time at which and the circumstances under which the order may be applied for and obtained, all tend to shew that the evidence procured under it may be used at any stage of the inquiry at which evidence may be given relating to the offence or to the person accused of the offence.

The evidence is taken in the "prosecution pending," and being so taken, it is difficult to see how it could be rejected at any stage of the inquiry at which evidence may be taken; and we do not think that the provision enabling it to be used as well before the Grand Jury as at the trial prevents its being used at any other time, if required.

We think, however, that the order ought to provide that the commission be returned into this Court, and ought not to limit the use of the evidence.

The appeal will be dismissed with costs.

Regina v. Chetwynd, 23 Nova Scotia 332; *Regina v. Gibson*, 16 O.R. 704; Imperial Act 30 & 31 Vict. ch 35, sec. 6.

Appeal dismissed.

Note: *Evidence taken abroad under commission—Crim. Code, sec. 683.*

The practice of taking evidence in a foreign country under commission for use on a criminal trial was introduced in Canada by the statute 53 Vict. (1890) c. 37, s. 23. It, however, made no such reference as is contained in code section 683 to the use of the evidence before the Grand Jury, and it was held by Ritchie and Meagher, JJ., of the Supreme Court of Nova Scotia, that an order made under the 1890 statute for taking evidence in a foreign country was wrong in ordering that the evidence be read before the Grand Jury. *Reg. v. Chetwynd* (1891), 23 N.S.R. 332. Ritchie, J., there said:—

“The Grand Jury have a right to decide for themselves upon what evidence they will find a bill, and this court cannot enquire into the proceedings before them or as to the nature of the evidence which they took into consideration, and the Grand Jury could refuse to read these depositions notwithstanding the order of the Judge.”

McDonald, C.J., held on the contrary that the evidence might properly be submitted to the Grand Jury, as in his opinion all the proceedings in a criminal prosecution from the information to the conviction or acquittal, as the case may be, constitute the “trial” of a cause, and as the inquiry before the Grand Jury is consequently part of the proceedings of the “trial.”

The construction thus given to the word “trial” is opposed to that laid down by Armour, C.J., and Street, J., of the Q.B.D. in Ontario in *Reg. v. Gibson*, 16 O.R. 704, where it was held that a motion to quash an indictment is not a proceeding “on the trial” but rather before the trial.

As to the general effect of the 1890 statute now embodied in sec. 683 of the Code, McDonald, C.J., said in the *Chetwynd* case:—

“It was suggested at the argument that the intent and true construction of the Act was only to authorize the examination of persons residing out of Canada who might accidentally or opportunely be found in Canada or brought or induced to come into Canada for examination before a commission appointed under the statute. I cannot adopt that contention. The intention of Parliament was evidently to afford increased facilities for the production of evidence in criminal cases. . . .

. . . I must assume that Parliament was informed of the provisions in our rules of practice for taking evidence abroad, and I must also assume, I think, that Parliament did not contemplate that either under the present practice in civil cases or under rules to be made by the court in pursuance of the statute under consideration, the prisoner should be taken beyond the boundaries of Canada to be personally present at the examination of witnesses under the commission. The intention of

Note—Continued.

Evidence taken abroad under commission—Crim. Code, sec. 683.

Parliament, therefore, must have been that it would suffice to have the prisoner represented by counsel, with authority to cross-examine witnesses and otherwise represent him. It would therefore appear to be incumbent on the Crown to take care that counsel having the authority of the accused to represent him attended at the examination on his behalf. This does not appear so objectionable when we consider that should the prisoner desire to avail himself of the Act to obtain evidence on his own behalf, he could only do so by counsel representing him at the examination."

It has recently been decided by Judge Snider, of Hamilton, that an order may be made under sec. 683 for taking in Canada under commission the evidence of a material witness who ordinarily resides out of Canada, but who is temporarily within the jurisdiction and about to return to his own country. *Rex v. Baskett* (1902) 6 Can. Cr. Cas. 61.

[COUNTY COURT, DISTRICT NO. 4, NOVA SCOTIA.]

BEFORE HIS HONOUR J. P. CHIPMAN, COUNTY JUDGE.

THE QUEEN v. WATSON AND KENWAY.

Highway—Common law right of free passage—Assembly of religious nature on town street—"Salvation Army"—Obstruction of street by assembled crowd—Liability of members.

1. There is no legal right at common law for persons to assemble in any numbers upon a highway and to remain assembled there as long as they please to the detriment of others having equal rights of passage over the highway.
2. An assembly of a moral and religious character, *ex. gr.* the Salvation Army, is subject to the same rule, and members thereof who hold a religious service on a town street and thereby collect a crowd which blocks the free passage of the street are properly convicted under a statute prohibiting persons from standing in a group or near to each other on the street so as to obstruct a free passage for carriages, etc.

ARGUED : November, 1895.

DECIDED : April, 1896.

APPEAL from a summary conviction of the defendants, members of the "Salvation Army," under the Towns Incorporation Act of Nova Scotia, for standing in a group or near to each other on a street so as to obstruct a free passage for foot passengers, carriages or vehicles, and for neglecting, upon the request of a constable, to remove and not obstruct the street.

WINDSOR, N.S., November, 1895.

Roscoe and Dennison, for the prosecutors.

Congdon and Judge DeWolfe, for the defendants.

KENTVILLE, N.S., April 1, 1896.

CHIPMAN, Co.J.:—This is an appeal from the conviction made by His Honour, W. M. Christie, Stipendiary Magistrate for the Town of Windsor, against the defendants for violation of the provisions of section 180 of the consolidated "Towns Incorporation Act."

The section reads as follows:—

"Persons shall not stand in a group or near to each other on any street, lane, highway or thoroughfare so as to obstruct a free passage for foot passengers, carriages or vehicles, under a penalty of not more than ten dollars on such person so offending, and, on non-payment thereof, to imprisonment in the jail or lock-up for a period not exceeding thirty days; and any person or persons refusing or neglecting upon the request of the Mayor, any Councillor, policeman, constable or watchman, to remove and not obstruct such street, lane, highway or thoroughfare, shall be deemed to have committed the above offence, and shall be liable to the penalty."

The facts, briefly stated, are:—That the defendants, James Watson and George Kenway, are officers in the Salvation Army, the former an ensign in charge of five corps, and the latter a captain. On the evening of the nineteenth September last, they, with nine other members of the Army, left their barracks, situate on Grey Street in said Town of Windsor, to hold one of their open-air services at the junction of Gerrish and Water Streets, called Knowles' Corner.

The defendants had been arrested on the Tuesday night prior to this day for violation of one of the by-laws of the town, for beating a drum, etc., and it was current rumour that if the Army held a meeting at the corner in question that evening arrests would probably be made.

Doubtless this rumour caused a much larger number of persons to accompany the Army on its march, and to assemble at the corner awaiting its arrival. The whole number were variously estimated at from 200 to 700.

As the Army approached the railway crossing at that corner the persons there assembled opened out and the Army, with defendant Watson leading and in command, entered and formed a circle on Water Street between the railway track and street crossing; and defendant Watson commenced the services by offering prayer. At the time the circle was being formed policemen McDonald and Smith made their way into the crowd, which at

the time had so blocked the streets as to make them practically impassable for foot passengers or vehicles without the crowd giving way and making the necessary opening. McDonald, who was in advance, immediately requested the defendant Watson, in a tone of voice loud enough to be heard by the persons in the circle, to "move on and get out of this." It is admitted that these words or words of like import were used. He also made a like request a second time at least, and defendant Watson admits that policeman Smith also gave him a similar notice. The request was not complied with, and Smith arrested and took him, Watson, to the lock-up. When defendant Watson was arrested, defendant Kenway continued the services and commenced to pray, and then McDonald turned to him and requested him to "move on." The request was not acceded to, and he was arrested and removed from the circle. After Kenway's arrest the meeting was continued by Mrs. Watson, wife of the defendant, and others of the army, who still remained there for some ten minutes afterwards.

It is difficult to determine the exact length of time that elapsed between the arrival of the army at the said railway crossing and the arrest of defendant Watson. The estimate given by the witnesses was from half a minute to three minutes; but all coincide that it did not exceed three minutes. I cannot think it is very important to determine whether the exact time was one or three minutes, and unless the time had been accurately kept by some one of the witnesses, which is not the fact, I do not wonder that the different witnesses disagreed to some extent.

The defendants strenuously urged, however, that the time occupied was so brief that they had not an opportunity to decide whether they would comply with the request or not before they were placed under arrest. And it was also contended that the crowd had so closed in around them that they could not have moved on if they had been so minded. The fact sworn to by both of them clearly indicates that they made no physical effort to comply with the notification of either of the policemen. They were kneeling at the time, and both had to be assisted to their feet by the policemen. In view of this fact, and the fact that the

defendants, Watson in particular, who had charge of the Army at this station and gave them directions and instructions as to the places of meetings, etc., had been notified by policeman McDonald not to hold meetings at this corner, and also requested by Councillor Douglas on the day in question not to hold a meeting thereat on that evening, to which notice and request said defendant had refused acquiescence on the ground that he had a right to hold meetings where he chose, it seems to me that the impression which the defendants sought to give and convey was disingenuous, and not such as I would have expected from persons who undeniably went to this corner on this particular evening, either to assert a right, or because they thought such a right existed, and even although it might be in direct opposition to the instructions of the authorities of the town.

Prior to the arrival of the army at the corner a much larger number of persons than usual had assembled thereat, and doubtless some of them may have stood in groups; but the weight of evidence shows that no obstruction actually existed. They moved up and down the street, and a passage was obtainable for foot passengers and vehicles without much difficulty. It was not until the army arrived that the streets became blocked; then foot passengers could not get through without the crowd giving way, and a carriage coming down Gerrish Street was led by an onlooker round the Dakin Corner into Water Street. Quite soon after the arrests were made an equally favourable condition as to a passage existed as prior thereto.

Now, the question for determination is whether the defendants under the facts stated are liable to be convicted?

The defendants' counsel ably conducted the case for their clients, and, at the close of their arguments, asked permission to submit further authorities to sustain their contention that the defendants should not be convicted. This permission was granted, and I also endeavoured at the trial to give the defendants every possible opportunity to furnish evidence to substantiate the defence most fully.

Some authorities have since been submitted, but on due consideration and examination I do not think that they are pertinent, and I cannot accept them as authorities for the purpose indicated. In the case strongly relied upon by His Honour Judge DeWolfe, the proceedings were instituted under an entirely different statute, and for unlawful assembly.

Another case was that of an indictment at common law for a nuisance in obstructing a highway. All the incidents necessary to create a nuisance at common law applied to this indictment, and the jury found the defendants not guilty on the question of fact submitted to them.

In deciding this case I am not to be governed by sentiment, but by what I honestly and firmly believe to be the true construction of the statute as applicable to the facts submitted in evidence. For the Salvation Army I cannot but entertain feelings of deep respect. Their noble deeds of charity in different parts of the world are too well known to speak of them as a body in other than terms of commendation and admiration. But, however much I might desire to commend their work and their laudable objects and purposes, I cannot allow any feeling of sympathy to influence my judgment in a judicial matter, like the one now under investigation. So far as I can I must interpret and construe the statute according to well understood principles of interpretation. One of these is thus stated:—

“In a word it is to be taken as a fundamental principle, standing as it were at the threshold of the whole subject of interpretation, that the intention of the Legislature is invariably to be accepted and carried into effect whatever may be the opinion of the judicial interpreter of its wisdom or justice. If the language admits of no doubt, or secondary meaning, it is simply to be obeyed, without more . . .”
(Maxwell on Statutes, 65.)

Now, it seems to me that the intention of the Legislature in the statute in question can be clearly gathered from the language used therein, and that it is not an unreasonable construction thereof to hold that persons who “stand in a group or near to

each other" on a public street so as to obstruct a free passage for foot passengers, carriages or vehicles, shall be subject to a penalty; nor for the purpose of facilitating proof of the offence to say that if such persons neglect to remove when requested, they shall be deemed to have committed the offence which the statute intended to prevent.

At the trial much stress was laid on the assertion that the Army had the right to hold meetings in the streets of the town. I was then of the opinion that the principle in the abstract, and without legislation, was probably correct, inasmuch as their object was of a peaceable, moral and religious character, and not for an unlawful purpose, nor to provoke a breach of the peace or create disturbance of any kind. I find, however, that such a privilege, as a matter of legal right, does not exist. It is laid down by Wills, J., in *Ex parte Lewis*, L.R. 21 Q.B.D. 197.

"That a claim on the part of persons so minded to assemble in any numbers and for so long a time as they please to remain assembled upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it. . . . Things are done every day in every part of the Kingdom, without let or hindrance, which there is not, and cannot be, a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right."

The last paragraph is a complete answer to the argument that because the Army had held meetings at this particular corner for upwards of nine years, the right had been admitted and could not now be questioned.

If one should examine the statute to ascertain if possible the reason for or the intention the Legislature had when passing it, it can be found, I think, in the declaration of the common law principle established by the decision of Wills, J., in the above-mentioned case. Again, it would seem to be a most reasonable

provision that the town authorities should have it in their power to prevent the streets from being obstructed by persons standing in a group or near to each other, particularly in the thoroughfares of the town—and it must be understood that the corner in question is the principal thoroughfare of the Town of Windsor—the result of which must necessarily be that the *free passage* to which the public are entitled does not for the time being, in point of fact, exist.

It was also urged by the defendants that they and their associates in the Army did not create the obstruction, for the reason that eleven persons forming a circle at this place could not obstruct the passage for foot passengers and vehicles, and they were not responsible for the crowd that assembled there. This argument in my judgment is entitled to little weight. The fact is unquestioned that the defendants were not only the direct cause of the crowd that assembled, but that they deliberately and with a full knowledge of the crowded conditions of the streets prior to their arrival at the locus marched forward and allowed themselves to be encircled by the onlookers, so as to complete the blockade, and thereby obstruct the free passage for foot passengers and vehicles. They were part and parcel of the assemblage, and, in my judgment, were equally liable with others to be proceeded against for the infringement of the statute.

It is absurd for the defendants to contend that they do not collect an audience to hear their services. The whole object, desire, intention, aim, and real purpose of the open-air meetings must of necessity be to draw as large a number as possible to attend them, else they would have been willing to have held their meetings at another corner in the town, about 300 feet distant, but which, in fact, is not so much a thoroughfare as Knowles' Corner, and not a place where nearly as many people ordinarily pass and repass in the course of the evening.

The penalty fixed by the statute is a fine for each person offending not exceeding ten dollars, and imprisonment on non-payment thereof for a period not exceeding thirty days.

In cases of appeal under the Dominion "Summary Convictions Act" [Criminal Code, section 883] the Court may "confirm, reverse or modify the decision of the Justice, or may make such other conviction or order in the matter as the Court thinks just," but such a provision in the Nova Scotia "Summary Convictions Act," under which the proceedings have been instituted, does not seem to exist, and I am obliged, I think, if I find the defendants severally guilty, as I am of opinion under all the circumstances that I should and now do—to confirm the conviction below without modification.

The costs, however, are in my discretion, and as I think the fines imposed by the conviction, under all the circumstances proven, are larger than I should impose if I had the right to fix the amount, I will direct in the order affirming the conviction that it shall cover only the costs of the Court below, and not the costs of the appeal in this Court.

Conviction affirmed.

Note: *Religious gatherings on streets and highways.*

The prosecution in the *Watson* case above reported was under a special statute restricting the use of public streets in towns. There is also the provision in the vagrancy clauses of the Criminal Code, sec. 207 (f), under which everyone is a loose, idle or disorderly person or vagrant who causes a disturbance in or near any street, road, highway or public place, by impeding or incommoding peaceable passengers.

An indictment also lies at common law for noisy nuisances and disturbances in the public streets, if a real and substantial nuisance and not a mere temporary inconvenience, is caused to the public. See also Code sections 191, 192 and 193.

In 1890 Mr. Herbert Booth and another officer of the Salvation Army were prosecuted on a charge of obstruction and disturbance of the highway at Whitchurch, Hampshire, on the occasion of a gathering of the "Army" in the market place there. The indictment, on account of local prejudice, was removed to the Central Criminal Court, and thence to the Q. B. Division, where it was tried before the late Lord Coleridge, L.C.J., and a special jury. The leaders of the Salvation Army had ordered a general muster from the country round to protest against the proceedings of the magistrates, which the Army seemed to think had not been quite fair, on previous occasions. About 2,000 persons, accompanied by bands, assembled, and marched into and took possession of the square or market-place of the

*Note—Continued.**Religious gatherings on streets and highways.*

town, which was not of any great extent, under the leadership of Mr. Booth in a one-horse vehicle, and two men on horseback. Whilst this was going on and speeches were made the whole centre of the town was occupied and crowded, and traffic was quite impassable. In the evening the crowd lighted torches, carried Mr. Booth up and down on their shoulders, and blocked the market-place and main thoroughfare even more completely than before. The multitude occupied the square all the evening, obstructing the centre of the town and the streets leading out of it until nine o'clock, when they dispersed. The Lord Chief Justice told the jury: "If persons collect large numbers of people so as to cause a nuisance to the public, though not with any intention to do mischief, yet interfering with the rights of others, they break the law. Therefore, if the defendants collected a great number of people on the highway, obstructing and intending to obstruct the highway, they acted unlawfully. But it was not any trifling or temporary obstruction that would be an offence." The Lord Chief Justice said "there was evidence that Mr. Booth had said 'he would take the square' and he had taken it. But then people must submit to little temporary inconveniences." He also said it had been argued by counsel "that the people had a right to be there, and so they had, and the mere temporary inconvenience they caused was not an indictable offence. As to the count about noise, if it was done for the purpose of annoyance it would be unlawful, but the mere playing upon instruments by these people as they walked along was not unlawful." The learned judge left the question of noise and obstruction to the jury, telling them that "unless satisfied there had been a real and substantial nuisance they must acquit the defendants." The defendants were acquitted. *R. v. Booth and others*, London Times, July 2nd, 1890; Stone's Justices' Manual (1902) page 909.

A by-law provided that "every person who shall sound or play upon any musical instrument, or sing, or make any noise whatsoever in any street, or near any house within the borough, after having been required by any householder resident in such street or by any police constable to desist from making such sound or noise either on account of the illness of any inmate or from any other reasonable cause," shall be liable, &c. The defendant, a "Captain" in the Salvation Army, played on a concertina on a Sunday morning surrounded by a crowd in a square in Truro, and refused to desist at the request of the superintendent of police, who told him he had reasonable cause for the request by reason of the complaints of the inhabitants. The Q.B. Division held there was nothing unreasonable or void in such a by-law, and it was for the justices to decide whether there was a reasonable cause for requiring the appellant to desist. *R. v. Powell*, 48 J.P. 740; 51 L.T. 92.

A by-law at St. Albans made liable to a penalty any person blowing a horn "or any other noisy instrument," to the annoyance of any of the inhabitants. The justices found that a concertina was a noisy instrument, and a conviction was upheld. The Q.B. Division held it was sufficient to

Note—Continued.

Religious gatherings on streets and highways.

prove the instrument was a nuisance or annoyance to some of the inhabitants, and that it was not requisite to prove it was a public nuisance to all the inhabitants. *Booth v. Howell*, 53 J.P. 687.

A by-law provided that "No person shall sound or play upon any musical or noisy instrument, or sing in any public place or highway within fifty yards of any dwelling-house, after being required by any constable, or by an inmate of such house personally, or by his or her servant to desist." Defendant was conducting an open air religious service on a public highway, and persisted in singing within fifty yards of a dwelling house, after having been requested by a police constable to desist. The case was considered of such great importance that it was heard by a specially constituted court of seven judges and the conviction was upheld. *Kruse v. Johnson* [1898] 2 Q.B. 91.

[RECORDER'S COURT OF THE CITY OF MONTREAL]

BEFORE A.E. POIRIER, ESQUIRE, RECORDER.

CITY OF MONTREAL v. FORTIER.

Sunday observance—Montreal city by-law as to petty trading—Sale of cigars and confectionery—By-law invalid for unreasonableness.

1. Montreal City By-law, No. 281, permitting the sale on Sunday of "fruits, cigars, confectionery and temperance beverages" by all persons who sell all these things and are not engaged in trade is invalid as arbitrary and unjust because it does not authorize the sale of tobacco as well as cigars, and because it does not extend to all persons who are engaged in the same business.

MONTREAL: July 7, 1902.

PER CURIAM:—Since March 15, 1870, in virtue of by-law No. 36, section 1st, it has been declared that

"No merchant, trader, petty chapman, peddler, hotel or tavern-keeper, or any other person keeping a house or place of public entertainment within the limits of the said city. or any other person, shall be allowed to keep open their places of business, and expose for sale, or be permitted to sell or retail on the Lord's day commonly called Sunday,

any goods, wares, merchandise, wines, spirits, or other strong or intoxicating liquors, or to purchase or drink the same, in any store, shop, hotel, tavern, house or place of public entertainment within the said city."

On June 2nd, 1902, this by-law was amended as follows by that bearing the No. 281:

"But such prohibition shall not apply to persons selling on Sunday, fruits, cigars, confectionery and temperance beverages, in the city as well as in St. Helen's Island Park.

"This exception shall apply only to persons selling by retail all such goods and carrying on such trade only, but not to groceries nor to other business establishments where only one or some of these articles are sold.

"The exposure of such goods outside of said stores, on Sunday, shall not be allowed."

"Section 2.—No purchasers shall be allowed to remain in said stores or in any of the adjoining rooms, on Sunday, for a longer time than that required to make purchases, and to consume them, if this be done where the purchases are made.

"Section 3.—This by-law shall be deemed to form part of said By-law No. 36 for the application of the penal clause, and for all other purposes."

The defendant, as well as nine other traders of Montreal, is prosecuted for having violated the last by-law inasmuch as not being a person engaged in carrying on the retail trade of fruits, cigars, confectionery and temperance beverages only, but being a merchant selling one only or some only of these articles, he has illegally sold a cigar on the 22nd of June last.

According to the proof, this cigar was sold to Constable Savard, accompanied by Constable Vezina. These gentlemen did not see any fruits in defendant's establishment which seemed to them to be a tobacco store, but the defendant has proved that since the amendment passed on the 2nd of June last, he carried an assortment of fruits, cigars, confectionery and temperance beverages.

I ought to remark, before entering into the examination of the questions raised in the cause that nothing specific has been proved as to the question of ascertaining if the defendant carried on a retail business only of these four articles.

Eleven traders have also been prosecuted for having violated the by-law in selling tobacco illegally. For these the defence will be different. Tobacco not being mentioned among the four articles already cited: "fruits, cigars, confectionery and temperance beverages," the sale of tobacco would be absolutely prohibited on Sunday.

These twenty-one cases are united by virtue of an admission of the parties and I believe that they can be decided concurrently, although two categories of different complaints have been formulated.

The defence can be summed up in this dilemma: either the by-law permits us to sell what we have sold, in which case we are not guilty; or else the by-law prohibits what we have done in which case it is illegal and unconstitutional, and in which case we are bound to be acquitted.

Paragraph 2 of article 1 of the by-law declares that the permission to sell cigars, etc., will not apply to groceries nor to other business establishments where only one or some of these articles are sold. But this permission extends to persons selling by retail these articles only.

Is it only on Sunday or only on other days? The by-law does not say. If a person who, on Sunday, sells and exposes for sale these four articles only has a right to benefit from the privilege created by the amendment of the 2nd of June, 1902, why should the defendant be deprived of this privilege? Should it be because on the other days of the week, or on Sunday also, he carries on a tobacco shop, or keeps other merchandise?

In order to resolve the question the Court ought first of all to consider the known circumstances and the public reasons which have caused the adoption of the amendment of the 2nd of June. It is recognized that Sabbath observance is a question which has given rise to acrimonious debates in our city.

The population is divided into two elements: The one demands that all work, all amusement and all business be suppressed on Sunday. The other wishes to tolerate a certain business on the Sabbath day in the interests of the classes who have only that day for recreation, and also for the purchasing of some delicacies.

The majority of the City Council representing these taxpayers have passed a by-law, the effect of which ought to be to close up the large business establishments open on Sunday in violation of the existing law, and to let the public at the same time provision itself with fruit, cakes, soft drinks, cigars, tobacco, journals, etc., in establishments generally of modest appearance conducted most frequently by widows and workmen.

The amendment of the 2nd of June has been counter-drawn word for word on the last part of the phrase of paragraph 76 of article 300 of the Charter of Montreal of 1899. This article permits the regulation of the sale of these things, but it does not authorize their prohibition, as the defence has remarked. Does the amendment well express the mind of the Council? Does it go beyond the intentions of the aldermen? Does it go beyond the powers which are conferred upon them by article 300?

If the sale of "fruits, cigars, confectionery and temperance beverages" should be restricted to persons who sell them on Sunday only and do not sell any other thing on the other days, has the Council decreed a thing arbitrary, oppressive, impracticable?

The Council has not mentioned tobacco, matches, cigar-holders, paper, envelopes, stamps, pipes, journals, cakes, play-things, milk by the glass, etc., among the things permitted. If the amendment of the 2nd of June is to be interpreted in a severe and restrictive manner, the sale ought to have then been absolutely prohibited.

If the interpretation given by the city is logical, the first nine defendants are guilty of having sold a cigar or cigars, because, although they sold on Sunday "fruits, cigars, confectionery and temperance beverages," that is to say all the mer-

chandise required by article 1 of by-law 281, and not only some of them, they would not be carrying on this business only on the other days of the week.

And ought the eleven other defendants to be condemned for having sold tobacco, when their right is recognized without dispute to sell cigars, confectionery, etc.?

If he be permitted to sell cigars, that is to say articles generally made of *tobacco* (merchants of true tobacco need not take offence at this mode of speech), why should he be prohibited from selling tobacco? If he be permitted to sell cigars why should he be prohibited from selling cigar-holders to smoke them with? Why should the sale of matches for lighting them with be prohibited?

If he be permitted to sell cigars, why should he be prohibited from selling cigarettes and cigarette-holders?

If he be permitted to sell tobacco *in cigars*, why prohibit the sale of tobacco *in plugs* or *in twists* or *in rolls* or tobacco *snuff* or *chewing* tobacco? Are the devotees thereof to be obliged to masticate or *chew* cigars?

Shall it be said that he who smokes a pipe has less right than he who smokes cigars?

The Court is not flattered with having to employ all these terms of trade, but it knows no others to which it can usefully have recourse in this discussion.

One other point of by-law 281 which is of great importance in this case is article 2:

“No purchasers shall be allowed to remain in said stores or in any of the adjoining rooms, on Sunday, for a longer time than that required to make purchases, and to consume them, if this be done where the purchases are made.”

What should one understand by the adjoining rooms of these stores? Can it only be applied to smoking rooms to be found in some of these stores?

Should the pretention of those who say this article authorizes them to remain in these rooms the time necessary to consume and

in *consuming*, on the place, the cigars which they may have bought there be dismissed as ill-founded?

The rules which ought to prevail in making a municipal ordinance are universally known. We find them summed up under the following titles in Dillon on Municipal Corporations, pages 394 to 402:

"In order to be valid a municipal ordinance must not exceed the powers conferred by the charter or the statute on which it is based; it must be reasonable and lawful; it must be impartial, fair and general; it must not be oppressive; it may regulate and not restrain trade; it must not contravene common right."

Can one reconcile these rules with the different dispositions of our by-law 281 and the consequences at which one ought to arrive in interpreting and rigorously applying it and say that it is not capriciously arbitrary, oppressive, unjust? If the Superior Court, which by a recent decision of the Honorable Justice Pagnuelo, has annulled by-law No. 264 adopted on the 15th of April, 1901, had to appreciate what I am analyzing at this moment, I fear very much that it would have subjected it to the same fate.

This was also the fate of by-law No. 222 "concerning the early closing of shops" annulled on the 12th of November, 1896, on a petition of Dame Philomene Rasconi, by the Honorable Justice L. O. Loranger. And one cannot refrain from remarking in reading this by-law that it defines the word "shop" and says that this word does not apply to the "establishments wherein tobacco only is sold, as well as such articles as are required in connection with the use of tobacco, such as pipes, cigar-holders, matches and others, nor to the establishments or public resorts where newspapers, periodicals, reviews, magazines, and others only are sold." It is useless for me to express a more precise opinion on this point. It will therefore be for another tribunal to decide as to the legality of by-law 281 interpreted strictly in the sense of the prosecution.

As to the second proposition of defendants, to wit, that they

have conformed with the new by-law and that it permits them to sell what they have sold, I will cite a work which is an authority before making known our conclusions.

I find in Maxwell "On the Interpretation of Statutes" many principles well recognized from which one ought never to swerve. Thus:

"Whenever the language of the Legislature admits of two constructions, and if construed in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words." Page 277.

"In determining either what was the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice, and legal principles, should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law." Page 264.

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." Page 319.

Profit can also be reaped for this cause from what has been written on the interpretation of *connected words* and of *generic words* in an enumeration. (See Maxwell, page 468 and following pages, and the case of *The Queen v. France et al* (1898), 1 Can. Cr. Cas. 321, 7 Quebec Official Reports, Q.B., page 83, judgment of the Hon. Mr. Justice Wurtele.)

I am therefore of opinion that the prosecution cannot, without leading us to absurd consequences, to ridiculous contradictions, to distinctions of favor, to oppression and to injustice, and finally to a result altogether different than that which was in-

tended to be the object of the amendment of the 2nd of June, ask us to limit the privilege of doing business on Sunday to four specific articles and to certain favored persons.

It has been said that the Council had not the intention of permitting the *tobacconists* to open their stores on Sunday. Why has it not said so in formal terms, affording no opportunity of equivocation? The tribunals do not exist in order to give effect to the doubtful intentions in opposition to the texts of law, although the intentions of a legislative body ought to be taken into consideration as I have already explained above.

It has been said that the spirit rather than the letter of the law ought to be considered. This is true when it relates to things of the same nature, *esjusedem generis*, the dispositions which apply to fruits, cigars, etc., but as to the dispositions which limit the right to deal in those things they ought to be interpreted in a restrictive manner, like all penal law.

It has been said that the Council had desired to come to the assistance of poor persons who require their little business on Sunday in order to gain their means of subsistence. Why has it not specified the rent paid by these people or the amount of their salary in certain cases, or their age, or the number of their children?

It is pretended that certain tobacco merchants are in bad faith by reason of their now selling fruits and effervescent drinks. But can there be bad faith in the eyes of the law when all the exigencies of the law have been complied with, when there is offered for sale all the merchandise and not only some of the merchandise required by law?

As to the rest, I see no possible line of demarcation between a tobacco store not having any need of doing business on Sunday and one in regard to which the proprietor finds it necessary. I see no reasonable means of knowing if a tobacco merchant is obliged to open his store on Sunday to do credit to his business, and I find little justice in a system of official tolerance which decrees inferiority from the point of view of fortune, to those who enjoy it, and puts a stain on their credit.

For these reasons as I have explained at greater length than I have desired—protesting my desire not to thwart the religious authorities of this city, and to aid the police to obtain Sabbath observance under conditions satisfactory for all races and classes and compatible with their needs and the conditions of modern existence—I am therefore bound to declare that I see no other alternative than to dismiss the 20 prosecutions that were submitted to me on the 3rd instant at the same time as the present proceeding.

L. A. Lefebvre, Clerk of the Recorder's Court, for the city.
E. Pelissier, J. T. Cardinal, J. Crankshaw and J. F. Dubreuil,
for defendants.

Case dismissed.

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J.

THE QUEEN v. LE BLANC.

Right of reply—Counsel representing the Attorney-General—Defence adducing no evidence—Summing up for prosecution—Cr. Code, sec. 661.

1. Where no evidence is offered for the defence, the defendant's counsel has the right to the last address to the jury notwithstanding that the prosecution is conducted by counsel acting for the Attorney-General.
2. The "right of reply" permitted by Code section 661 to the Attorney-General, or to counsel acting on his behalf, is the right to again address the jury at the close of the evidence, and before the address of defendant's counsel, when the defence offers no evidence.

DECIDED: November 3, 1893.

THE defendant was on trial upon a charge of murder, and the case for the prosecution had been closed.

Bonnar, for the prisoner, then announced that he did not intend to adduce any evidence.

Howell, Q.C., for the Crown, asked the ruling of the Court

as to whether counsel for the Crown, acting for the Attorney-General, should not have the right of reply.

Section 661 of the Criminal Code is as follows:—

“661. If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

2. Upon every trial for an indictable offence, whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them. R.S.C., c. 174, s. 179.”

WINNIPEG, November 3, 1893.

TAYLOR, C.J., held that the practice on the trial of a civil action where no defence is offered for the defendant should be followed, and counsel for the prosecution should therefore address the jury first, and that counsel for the defence had the right to reply. The right of counsel acting for the Attorney-General, which is referred to in sec. 661 of the Code is a right to again address the jury at the close of the evidence.

Note: Right of reply of Crown Counsel—Crim. Code, sec. 661.

There is some reason to doubt the correctness of the above decision. How can an address made before that of the prisoner's counsel be called a "reply"? The proviso at the end of sub-section 2 of s. 661 of the Code seems rather to be an extension of the statute 32-33 Vict. (Can.) ch. 29, sec. 45, and of the rule referred to in 5 St. Tr. N.S. 3 (n), as a "resolution of the judges" and which was intended to remove doubts which formerly existed as to the right of reply in such cases by counsel other than the Attorney-General or Solicitor-General. 2 St. Tr. N.S. 1019.

The resolution was as follows:—"In those Crown cases in which the Attorney or Solicitor-General is personally engaged, a reply where no witnesses are called for the defence is to be allowed as of right to the counsel for the Crown, and in no others." So in *R. v. Marsden*, M. & M., 439, it was held that the Attorney-General has the right of reply even though the defendant call no witnesses; and in *R. v. Toakley*, 10 Cox C.C. 406, the same right was accorded to the Solicitor-General appearing on behalf of the Attorney-General in a post-office prosecution.

The statute 32-33 Vict., (Can.) ch. 29, sec. 45, gave the right of reply to the Attorney or Solicitor-General or to any Queen's Counsel acting on behalf of the Crown.

It had previously been held in Ontario that the Crown Counsel not being the Attorney-General or Solicitor-General had no right of reply where no witnesses were called for the defence. *R. v. McLellan*, 9 U.C.L.J. 75. In Quebec the rule was to allow the reply in cases of public prosecutions for felony whether the Attorney-General appeared personally or by a representative. *R. v. Quatre Pattes*, 1 L.C.R. 317.

Phipson in his work on Evidence (1898), 2nd ed., p. 47, says:—"In Ireland all prosecuting counsel in public prosecutions represent the Attorney-General and have the same privilege." See also Eng. L.T., March 4, 1893, and April 24, 1897; 6 Law Magazine (1881), 101; Nineteenth Century (1895), 304.

It is not usual to exercise the right of reply where the only evidence adduced by the defendant is as to character. *R. v. Dowse* (1865), 4 F. & F. 492.

[SUPREME COURT OF THE NORTH-WEST
TERRITORIES.]

BEFORE RICHARDSON, J., IN CHAMBERS.

THE KING v. BENOIT.

Grain shipment—Allotment of railway cars—Statutory regulations in Manitoba and N.W.T.—Manitoba Grain Act 1900 (Can.)—Discrimination by railway agent in favour of grain elevator companies—Canada Statutes, 2 Edw. VII. (1902), c. 19, ss. 5 and 7—Summary conviction—Case stated—Crim. Code, sec. 900.

1. A railway station agent within the Inspection District of Manitoba to which the Manitoba Grain Act 1900 (Can.) applies, is guilty of an infraction of that statute if he allots cars to the elevator companies having grain elevators at a shipping point in preference to the unfilled prior order of a private applicant for a single car duly entered in the order book pursuant to sec. 58 of that Act.

ARGUED: February 19, 1903.

DECIDED: March 9, 1903.

THE defendant, A. V. Benoit, a station agent of the Canadian Pacific Railway Company, was, on the 6th December, 1902, on the prosecution of Charles C. Castle, convicted before T. O. Partridge, a justice of the peace in and for the North-West Territories, of violating the provisions of the Manitoba Grain Act and amendments thereto. A case was thereupon stated and signed under the provisions of sec. 900 of the Criminal Code, reciting the proceedings had before the justice of the peace, and submitting to a Judge for hearing and determination the seven questions of law referred to in the judgment.

REGINA, 19th February, 1903.

J. A. M. Aikins, K.C., and *Norman Mackenzie*, for Benoit, the appellant.

H. M. Howell, K.C., and *T. C. Johnstone*, for Castle, the prosecutor and respondent.

Sections 42, 57 and 58 of the Manitoba Grain Act as amended in 1902 by Canada Statute, 2 Edw. VII., c. 19, are as follows:—

42. On a written application to the Commissioner by ten farmers resident within twenty miles of their nearest shipping point, and on the approval of the application, the railway company shall, within the time hereinafter mentioned, erect and maintain at such point a loading platform, as hereinafter described, suitable for the purpose of loading grain from vehicles direct into cars.

2. Each loading platform shall be erected within the limit of the station yard, at a siding which the railway company shall provide on its premises in some place convenient of access to be approved by the Commissioner, and shall be at least ten feet wide, and of such other dimensions and be constructed of such materials and in such manner as the Commissioner designates, and in the case where there is no station yard at such siding as the Commissioner may prescribe, except at crossing sidings reserved for crossing purposes only.

3. Such loading platforms may be used free of charge for the loading of grain.

4. The railway company shall construct such loading platform within thirty days after the application is made to such company by the Commissioner, unless prevented by strikes or other unforeseen causes, and shall be held liable to pay a fine of not less than twenty-five dollars for each day's delay beyond that time. The period in each year within which the Commissioner may receive such applications shall be between the fifteenth of April and the fifteenth of October.

5. The railway company shall furnish cars to farmers, without undue delay, for the purpose of being loaded at such loading platform; and at any shipping point where there is no loading platform, cars shall be furnished by the railway company, without undue delay, for loading grain direct from vehicles.

57. Any person, firm or corporation guilty of an infraction of, or failing to comply with, any provisions of this Act, for which a penalty is not in this Act provided, or of any rule or

regulation made pursuant to this Act, shall, upon summary conviction, in addition to any other punishment prescribed by the law, be liable to a penalty of not less than fifty dollars nor more than one thousand dollars, and, in default of payment, to imprisonment for not less than one month nor more than one year.

58. At each station where there is a railway agent and where grain is shipped under such agent, an order book for cars shall be kept for each shipping point under such agent, open to the public, in which applicants for cars shall make order. Applicants may make order according to their requirements; cars so ordered shall be awarded to applicants according to the order in time in which such orders appear on the order book, without discrimination between elevator, flat-warehouse, loading platform or otherwise, and any applicant who fails to load the said car or cars within twenty-four hours from the time such cars are furnished by the railway company, shall lose his right so far as concerns the car or cars not so loaded.

2. When the railway company is unable, from any reasonable cause, to furnish cars at any shipping point to fill all orders as aforesaid, such cars as are furnished shall be apportioned to the applicants in the order of application as appearing in the said order books, until each applicant has received one car, after which the surplus cars, if any, shall be apportioned ratably according to the requirements of each applicant.

REGINA, March 9, 1903.

RICHARDSON, J.:—Questions 1, 2, and 3, argued together, are as follows:—

“1. Assuming that a farmer desires to load direct from his waggon into a car at a station, where there is a loading platform, and has made an order for such car to be placed at the loading platform and out of the batch of cars next arrivng, and one car has been allotted to said farmer for such purpose, but, by reason of there being other cars of prior applicants at the loading platform and to be loaded at such platform, the car allotted to said

farmer can not be accommodated or placed thereat, whereupon he applies to the station agent to be permitted to load the car direct from the waggon to the car at a point on the siding other than where the loading platform was:—

“Is it a violation of the said Grain Act for the agent to refuse such permission?

“2. Is the station agent obliged to permit such loading?

“3. Assuming that, by reason of other cars being loaded at the loading platform and to be loaded at such platform in priority to the car allotted to such farmer, such last mentioned car could not be placed at the loading platform within 24 hours after it was so allotted to the said farmer:—

“(a) Is it a violation of the Grain Act for the station agent to refuse to hold the car for said farmer longer than 24 hours after it was so allotted?

“(b) Is the station agent bound to hold the car even for the 24 hours for the farmer, when he knows that by reason of preceding cars to be loaded at the said platform, the said car cannot be loaded within 24 hours?”

After giving the subject matter of these my best consideration, I am unable to hold that the Act clearly provides for the points raised in these three questions, and, as the conviction, in my judgment, is sustainable upon others of the questions submitted, it becomes unnecessary and I decline to make any decided answer to these questions 1, 2, and 3.

Question 4 is as follows:—

“4. Assuming that a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped, and that he has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets:—

“Is it a violation of the said Grain Act and amendments for the station agent to refuse to recognize such farmer as an applicant and to recognize his order in the order book for a car or cars to ship out the said grain?”

Mr. Howell admitted that, as the operator of an elevator is

the only person who controls its working as to receiving in and passing out grain, he is the only person capable of making order for cars for shipment of grain in the elevator.

I hold that the station agent, by refusing the farmer's application as stated, did not contravene the law created by the Act.

Question No. 5 is as follows:—

"5. Assuming that a farmer has made order for cars in the order book at the station, and that all applicants for cars who had made order prior to his order in such book had each obtained one car, but not sufficient cars to fill the orders of each of the prior applicants, while the said farmer had not yet been allotted a car by reason of the shortage, and that the agent out of the next cars which arrived refused to award him a car, as there were a sufficient number of prior applicants whose orders had not been entirely filled, and that he consequently awarded of the said cars one to each of those who had ordered before the said farmer, but each of whom had already received one car:—

"Was the action of the agent a violation of the provisions of the Grain Act and amendments?"

This presents, as Mr. Aikins stated, on the argument, a conundrum. He endeavoured to convince me that the station agent in refusing to allot a car to the farmer, and preferring the elevator as stated, was not transgressing the law, although the effect of such action might result in barring the farmer entirely from having a car allotted to him; while, on the other hand, the effect of Mr. Howell's contention would bar out the elevators entirely.

While entertaining great doubts, I am inclined to agree with Mr. Howell's construction of sec. 58 as the only one it can have, and answer this affirmatively.

Question 6 is as follows:—

"6. Assuming that each of the prior applicants as above mentioned had been supplied with one car at the time when the said farmer gave his order as aforesaid, but on the day previous to the application of the farmer, there had been a surplus of cars after each prior applicant had been given one, and the agent in the distribution of said surplus had begun with the first appli-

cant and distributed said cars as far as they would go, giving two or three to each of prior applicants, but the orders of the said prior applicants still remained unfilled; that on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the said farmer, but allotted a car to each of the prior applicants, thus exhausting the said supply:—

“Did the agent by doing so make a breach of the provisions of the said Grain Act and amendments?”

I fail from the argument and reading of the Act to be convinced that the course adopted by the station agent formed a breach of any of the provisions, and answer this question in the negative.

Question 7 is as follows:—

“7. Assuming that a farmer residing near Sintaluta, who had grain to ship on the 20th October, made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded; that the agent allotted a car each to the elevator companies having elevators at the said point, but whose orders were subsequent to those of the said farmer:—

“Would this necessarily be a violation of the Grain Act?”

The action of the station agent as set out in this question was, in my judgment, a clear violation of the Act.

As a result, my judgment is that the conviction appealed from must be affirmed.

Conviction affirmed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE STREET AND BRITTON, JJ., SITTING AS A DIVISIONAL COURT.

THE KING V. HAYES.

Alien labor law—Knowingly assisting importation under contract—Omission to charge scienter—Invalidity not curable on certiorari—Importation of workman born in foreign country of British parents—“Aliens or foreigners,” meaning of—Canada statutes 1897, 60-61 Vict. c. 11; 1901, 1 Edw. VII. c. 13—Crim. Code sec. 889.

1. Where it appears upon a prosecution under the Alien Labour Statutes (1897 Can. c. 11 and 1901 Can. c. 13) that the workman was born in the United States, but that his father was born in Canada and no evidence is given that either the workman or his father became United States citizens by naturalization, it is to be inferred that the workman is a British subject and not an alien or foreigner.
2. The offence for which a summary conviction may be made under the said statutes is the “knowingly” assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service under contract made before the workman becomes a resident of Canada; and a conviction which does not recite that the alleged offence was done knowingly is bad as not disclosing an offence known to the law.
3. The omission of the word “knowingly” from both the information and the conviction is a matter of substance and not a mere matter of form, and the defect is not curable upon certiorari as an “irregularity, informality or insufficiency” under Code section 889.

ARGUED: January 15, 1903.

DECIDED: February 2, 1903.

ON August 25th, 1902, the defendant Hayes was convicted by George T. Denison, Esq., police magistrate at Toronto, for that he did at the city of Toronto and at other places unlawfully prepay the transportation and assist and encourage the importation and immigration of Frederick De Rocher, an alien and foreigner, from the United States of America into Canada under contract and agreement made previous to the importation and immigration of the said alien and foreigner to perform labour and service in Canada, viz., to act as a workman at the factory of the Toronto Carpet Manufacturing Co., Limited, in said city of Toronto, in the service and employ of the said company, contrary to the form of the statute in such case made

and provided. A fine of \$50 and costs was imposed. Upon the application of the defendant the conviction and papers were brought into the High Court by *certiorari*, and a motion was made to quash the conviction upon the following grounds:—

1. That Frederick De Rocher was not an alien or a foreigner, but was a Canadian and a British subject.

2. That there was no contract by the defendant Hayes with De Rocher prior to his importation that he should perform work or labour in Canada.

3. That there was no evidence that the United States have enacted and retained in force laws of a character similar to the Act under which the conviction was made.

4. That the United States laws given in evidence were not similar in character to the Act under which the conviction was made.

5. Similar to 3 and 4.

6. That Hayes supposed De Rocher to be a British subject.

7. That it was not Hayes but a brother of De Rocher who brought him in.

8. and 9. Denying any offence against the law.

The evidence shewed that the defendant went to Lowell, Mass., U.S., and engaged Frederick De Rocher and his brother Pierre to come to Toronto to work at the Toronto Carpet Co.'s factory, and that at Lowell he paid their fares to Toronto, and that upon their arrival in Toronto they were placed by the defendant in charge of a man who took them to a boarding-house, and that they were put to work in the factory. It appeared, also, that Frederick De Rocher was born in June, 1877, at Thompsonville, Connecticut, and that his parents were born in Canada, and had resided for several years in the United States, and that he himself had always resided there.

TORONTO, January 15th, 1903.

G. H. Watson, K.C., for the motion.

J. G. O'Donoghue, for the prosecutor.

The argument proceeded upon the points whether the remedy by *certiorari* lay in this case; and whether it must be presumed that Frederick De Rocher was still a British subject, because though born in a foreign country he was born there of parents who were presumably British subjects; and upon the fact that the only evidence given of the state of the law in the United States was not sufficient to satisfy the requirements of 60-61 Vict. ch. 11, sec. 9 (D.), which confines the operation of the Act to such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada of a similar character—inasmuch as the only evidence given of the kind was the production and filing of a pamphlet issued by the Treasury Department, entitled “Immigration Laws and Regulations,” dated April 9th, 1900, and purporting to be printed at the Government printing office at Washington, 1900.

TORONTO, February 2, 1903.

STREET, J. [after stating the facts of the case as above:—
The 1st section of ch. 11 of 60 & 61 Vict. (D.) is as follows:—

“From and after the passing of this Act it shall be unlawful for any person . . . in any manner to prepay the transportation, or in any way to assist or, encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada.”

The 3rd section of the same Act as amended by ch. 13 of 1 Edw. VII. (D.) is as follows:—

“For every violation of any of the provisions of section 1 of this Act, the person . . . violating it by *knowingly* assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service of any kind under contract or agreement, express or implied, parole or special, with such alien or foreigner, previous to his

becoming a resident in or a citizen of Canada, shall forfeit and pay a sum not exceeding \$1000 nor less than \$50."

And by sub-sec. 3 of sec. 3 as so amended, it is provided that such sum may, with the written consent of the Attorney-General of the Province, be recovered upon summary conviction before a police magistrate.

The offence of importing aliens under a contract to do work in this Province is a new offence created by the statutes in question, and it is an essential element in the offence that it shall be done "knowingly:" so that unless done "knowingly" it is no offence at all. In the present case the information does not charge the defendant with having "knowingly" done the acts charged, nor is he convicted of having "knowingly" done them: so that he has not been either charged with, or convicted of, any offence known to the law, and the conviction on its face is clearly bad: *Carpenter v. Mason* (1840), 12 Ad. & El. 629; *Reg. v. Justices of Radnorshire* (1840), 9 Dowl. P.C. 90.

The next question is whether the conviction is aided by sec. 889 of the Criminal Code, 55-56 Vict. ch. 9 (D.) which directs that no conviction on being removed by *certiorari* shall "be held invalid for any irregularity, informality or insufficiency therein, provided that the Court or Judge before which or whom the question is raised is upon perusal of the depositions satisfied that an offence of the nature described in the conviction . . . has been committed over which such Justice has jurisdiction."

I have been unable to come to the conclusion that the omission from the information and the conviction of one of the essential elements of the offence is either an irregularity, an informality, or an insufficiency. I think that it is not a matter of form merely but of substance: and that it is a fatal and incurable defect in the conviction. The police magistrate has never been required to pass upon the question as to whether the defendant is guilty of an offence under the statute or not: he has only been required to pass upon one-half of the facts necessary to make out the charge against the defendant. It is

entirely consistent with the charge and the conviction that the defendant is innocent of any offence at all. It seems to me that such a state of things is not that which is intended by the descriptions "irregularity," "informality," and "insufficiency," and it is widely distinguishable from the specimen objections given in sec. 890.

In case, however, I should be wrong in this view, I think it proper to say that having carefully considered the depositions I am not satisfied that the defendant has been shewn to have *knowingly* assisted, encouraged or solicited the importation of any alien or foreigner into Canada. The evidence shews that the defendant went from Toronto to Lowell, Mass., for the purpose of engaging French-Canadian workmen to work in the carpet factory here: that he engaged Pierre De Rocher, a French-Canadian, born in Canada of French-Canadian parents, and that at Pierre De Rocher's request he also engaged Frederick De Rocher, Pierre's brother, believing at the time that Frederick also was born in Canada of French-Canadian parents. It now appears that Frederick De Rocher was born in the United States, but that his parents were born in Canada. There is no evidence that either he or his parents were ever naturalized in the United States. The presumption from the only facts in evidence is that his parents are British subjects though residing in the United States, and that therefore Frederick De Rocher is a British subject: Dicey's Conflict of Laws, 1896, p. 178; 2 Steph. Comm., 12th ed., p. 406.

There is, therefore, every reason for the conclusion that the defendant believed when he engaged Frederick De Rocher to come to Toronto that he was only bringing back to Canada a British subject residing in the United States. The Act under which this prosecution is brought is directed only against the importation of aliens and foreigners; and one who is a British subject is neither an alien nor a foreigner although he happen to be living abroad: Anderson's Dictionary of Law; Black's Law Dictionary.

The conviction must, therefore, be quashed as being bad upon its face by reason of a defect which the evidence does not

enable us to disregard, and the prosecutor should pay the costs.

There will be the usual order protecting the magistrate.

BRITTON, J., concurred.

Conviction quashed.

Note: Alien Labour Act—Who are aliens?

All children born out of the King's allegiance whose fathers or grand-fathers by the father's side were natural-born subjects are deemed natural-born subjects themselves: *Heywood on Elections* 156.

The children and grandchildren of natural-born British subjects, though born in a foreign country are not aliens. *Salter v. Hughes*, *Oldright's Nova Scotia Rep.* 409. But their status as British subjects is merely personal and is not transmissible to their descendants. Mr. Justice Kay in *DeGeer v. Stone* (1882) 22 Chy. Div. 243, 253, said:—

"I must take the law to be that the grandchild born abroad, whose father was also born abroad, being respectively grandchild and child of a man who was by the common law a natural-born British subject, would be himself a natural-born British subject, but that his children, if born abroad, would be aliens."

An alien, in the general sense of the word, is one born in a strange country under the obedience of a strange prince or country: *Co. Litt.* 128 b.

To prove that persons are aliens it is not sufficient to swear merely that they are aliens, but particulars must be given to shew how they were aliens as by having been born in a certain place named out of the allegiance of the British Crown: *Reg. ex rel. Carroll v. Beckwith*, 1 P.R. (Ont.) 284. And evidence that a petitioner in an election case had lived in the United States without shewing that his parents were United States citizens, was held insufficient to establish alienage: *Prescott Election*, *Hodgins' Election Cases*, 1.

An alien who came to Canada and after a residence of ten years took the oath of allegiance, but who had taken no proceedings to obtain a certificate of naturalization was held to be still an alien: *Brockville Elections*, *Bacon's Case*, *Hodgins' Election Cases*, 129.

Those who are British subjects by birth, whether born within or without the King's dominions, may be held to be also subjects of a foreign state by the laws thereof: *Howell on Naturalization* (1884) p. 6. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside: United States Constitution, 14th amendment. There is, however, a State citizenship as distinguished from United States citizenship: *Morse on Citizenship*, page 302.

The child born of British parents in a foreign country may therefore have a double nationality and owe a double allegiance. Such a person may when of full age renounce his British citizenship by a declaration of alienage made in Canada under the Naturalization Act, Canada, 1881, now R.S.C. 1886, c. 113, secs. 4-6, or by voluntarily becoming naturalized in the foreign state: R.S.C. 1886, c. 113, sec. 7.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE STREET, J.

THE KING v. MULLEN.

Reserved case—Application for—Two dissenting jurors led to suppose that ten might convict—Jury not polled—Failure to object to verdict recorded—Evidence of juror inadmissible to contradict formal assent—Crim. Code., secs. 735, 743 (2).

1. On an application for a reserved case the evidence of a juror is not admissible to shew that he and another juror had refused to agree with the opinion of the other ten jurors, and had failed to object on the recording of the verdict favoured by the ten because some of the latter had told them that the agreement of ten was sufficient to carry the verdict.

DECIDED: March 2, 1903.

THE defendants were tried before STREET, J., at the Ottawa Winter Assizes on the 21st January, 1903, and convicted of an assault occasioning actual bodily harm. They were represented by counsel, who was present when the jury returned their verdict, and who addressed the Judge on their behalf on the 24th January, 1903, for the purpose of obtaining a lenient sentence upon them for their offence.

On 27th February, 1903, an application was made to STREET, J., by letter from *G. S. Henderson*, as counsel for the defendant *Murphy*, accompanied by the following affidavit, to state a reserved case under sec. 743, sub-sec. 2, of the Criminal Code:—

"I, Gordon Smith Henderson, of the city of Ottawa, in the county of Carleton, barrister-at-law, make oath and say:—

"1. That I was and am counsel for William Murphy herein.

"2. That the prisoners were tried on the 21st day of January, 1903, before the Honourable Mr. Justice Street and a jury, at the January Assizes in and for the county of Carleton.

"3. That the jury were out two hours and fifty minutes considering the verdict herein, and then found the prisoners

guilty, and they were sentenced on the 24th of same month.

"4. That the jury were not polled.

"5. That James E. Macpherson, one of the jurors herein, was not in favour of the verdict of guilty, and so informed me, but that he and another juror, who was also for an acquittal, were led to believe by other jurors and the constable in charge, that ten were sufficient to convict.

"6. That the said James E. Macpherson on or about the day of the conviction expressed himself, upon learning that the jury must be unanimous in criminal cases, that a mistake had been made, to Mr. Edmund F. Burritt, of Code & Burritt, barristers, who spoke to Police Magistrate Smith of the county of Carleton, who communicated with me, whereupon I immediately in person verified the said James E. Macpherson's statement and notified the department of justice."

TORONTO, March 2, 1903.

STREET, J. (after setting out the facts as above):—

I see no ground upon which I can state a reserved case. I am not aware of any question of law having arisen in the case. What is alleged is, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; but it is contrary to principle to allow the statements of jurors, even under oath, to be used for a purpose such as is here proposed: *Jackson v. Williamson* (1788), 2 T.R. 281.

In my opinion, it would be an extremely dangerous practice to permit the verdict of a jury to be disturbed in the manner or for the reasons here suggested, and I therefore refuse to state or reserve any case.

Application refused.

Note: *Inadmissibility of juror's affidavit to impeach his assent to verdict.*

To the same effect is the decision in the next following case of *The King v. Carlin* (No. 1) in which Mr. Justice Wurtel of the Court of King's Bench at Montreal has very ably and exhaustively dealt with the subject.

See also *R. v. Lawson* (1881) 2 P.E.I. Rep. 403.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WURTELE, J.

THE KING v. CARLIN (No. 1).

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits—Admissibility of evidence—Judge's comment on prisoner's challenge of jurors—Irregularity tending to prejudice the jury—Character evidence—Instruction to jury—Alleged prejudice of a juror—Finding of the triers conclusive—Affidavits of jurors to prove arrangement between jurors that a majority should carry not admissible—Affidavits to support verdict admissible—Impeachment of verdict—Reserved case on questions of law—Grounds for new trial—Motion for leave to apply to Court of Appeal—Crim. Code secs. 394, 668, 677, 735, 743, 747.

1. Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co. by bribing clerks in the company's employ to illegally and fraudulently disclose information of the secret audits to be made on trains and to furnish such information to conductors to enable them to be prepared for the audits when made and to be free at other times to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit they would communicate it to the conductor whose train was to be audited, for a purpose other than that of defrauding the company.
2. Where the trial judge, after five jurors had been sworn, said to prisoner's counsel in the hearing of the jurors composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause"—this is not a question of law which can be reserved but is a matter of an irregularity which might entail the annulling of the verdict if it were of a nature to unduly prejudice the jury against the accused. The remark complained of could not do so as it indicated no opinion for or against the prisoner.
3. Where the trial judge in charging the jury said: "About forty or fifty witnesses have been examined for the purpose of establishing his (the prisoner's) good character; it is very strange that it should take forty or fifty witnesses to establish it"—this was not a matter of law upon which a case could be reserved for the Court of Appeal, nor is it a ground for impeaching the verdict.
4. The fact that a juror has made remarks indicating a leaning for or against the accused will not of itself furnish ground for a new trial where the verdict is just and there is no reason to suppose that the juror's opinion was not derived from the evidence.
5. Where a juror has been challenged for favour the finding of the triers as to his competency is conclusive, although the accused and his counsel were not then aware of remarks alleged to have been made by the juror which would tend to show a bias against the prisoner.
6. Upon grounds of public policy the testimony or the affidavit or other sworn statement of a juror will not be received to impeach a verdict, nor to show that the jurors agreed on their verdict by a majority.

7. For the same reasons a juror cannot show on oath that he did not agree to the verdict as rendered or that he consented to it without concurring in it in order to secure his discharge.
8. But affidavits are admissible from the other jurors to support and confirm the presumption that the proceedings of the jury were correct and that there has been no misconduct.

ARGUED: April 17 and 18, 1903.

DECIDED: April 20, 1903.

APPLICATION on behalf of the accused to the trial Judge after verdict for a reserved case and to quash the verdict and for leave to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. 1

MONTREAL, April 17 and 18, 1903.

Cooke, K.C., and *Lafleur*, K.C., for the Crown.

Quinn, K.C., and *Laflamme*, for the prisoner.

MONTREAL, April 20, 1903.

WURTELE, J.:—Patrick Carlin was indicted upon the charge of having conspired with Herbert G. Johnston, and other persons unknown, to defraud the Canadian Pacific Railway Company; and the bill of particulars specifies that the means by which the fraud against the company was to be committed was by illegally and fraudulently obtaining, by bribing and paying clerks of the company, information of the secret audits of trains run by the company, and to furnish such information to the conductors of the trains to be so audited, and thus to enable them to be prepared for the audits when made, and at other times to be free to retain fares, and to allow passengers to ride free on the cars or for a reduced fare, thereby doing away with the object of the secret audits inaugurated by the company for the purpose of preventing fraud, dishonesty, and illegalities against it. On the 9th inst. he was found guilty.

A complex motion has been made since the rendering of the verdict, and after argument it was reserved for consideration by

the Court. The motion contains three distinct propositions. The first is an application to reserve certain questions of law, which it is alleged arose on the trial, for the opinion of the Court of Appeal; the second is an application for the quashing of the verdict on account of the bias or prejudice alleged to have existed on the part of certain jurors against the accused, on account of misconduct alleged to have been practised by the jury or by some of the jurors, and on account of the alleged disagreement of one of the jurors to the verdict as rendered in Court; and the third is an application for leave to apply to the Court of Appeal for a new trial on the ground that the verdict is contrary to the evidence.

I will now take up the various parts of the motion in the order in which I have mentioned them.

The first part of the motion asks that three questions of law be reserved.

The first question is that the trial Judge after five jurors had been sworn said to Mr. Quinn, K.C., of counsel for the accused, in the hearing of all the jurors composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause." This is not a question of law, but is a matter in the nature of an irregularity which might entail the annulling of the verdict. In order to do so, however, an irregularity of this kind must be of a nature to unduly prejudice the jury against the accused. The remark complained of could not do so. It indicated no opinion whatever either for or against the accused, and could not influence or bias the jurors one way or the other. I cannot reserve this point; and I do not find it to be a ground for impeaching the verdict. This question is, therefore, disallowed.

The second question of law is that the trial Judge refused to permit the accused to prove by certain witnesses who were examined on the 7th day of April instant, that information could be given by one conductor to another conductor of the auditing of his train for a purpose other than that of aiding him to defraud

the company, and that he illegally disallowed questions put to them to that effect.

The charge against the accused is of having conspired to defraud the Canadian Pacific Railway Co. by illegally and fraudulently obtaining, by bribing clerks in the company's employment, information of the secret audits to be made and to furnish such information to conductors to enable them to be prepared for the audits when made, and at other times to be free to retain fares and to allow passengers to ride free or for a reduced fare, and thus to defraud the company. It was only necessary to establish in evidence the existence of a combination or agreement between the accused and Herbert G. Johnston to defraud the company by getting information which would enable conductors to retain fares and to allow passengers to ride free or at a reduced rate, at certain times with impunity. A number of conductors were asked if they would inform the conductor of a train of the date on which a secret audit of his train was to take place if they knew it, and if such action on their part would not be for the purpose of putting them on their guard to avoid irregularities which might cause trouble to them, but which could not tend to defraud the company. These questions were objected to by the Crown prosecutors, and as I was of opinion that they were irrelevant, I maintained the objection. The conspiracy was to obtain information from which it would be known during what periods there would be no secret audits and by which it could be ascertained when a conductor would be free and safe to retain fares which he had collected or to allow passengers to ride free or for a reduced fare, and thus to defraud the company, and it was, therefore, immaterial if a conductor notified another conductor of the date of an audit merely in his idea to enable such other conductor to guard on that day against irregularities, inasmuch as the conductor of the train to be audited would thus know when secret audits would not be made, and when he would, therefore, be free and safe to retain fares and to allow passengers to ride free or for a reduced fare, and thus to defraud the company.

Evidence may be given of any fact in issue which is necessary to establish either liability or defence, and of any fact relevant to any fact in issue which may tend either directly or indirectly to prove or disprove a fact in issue ; but the Judge may exclude evidence of facts which though deemed to be relevant to the issue appear to him to be too remote to be material. Thus he may exclude all evidence of collateral facts, which are incapable of affording any reasonable presumption as to the principal matters in dispute and which tend to draw away the minds of the jurors from the points in issue, and to mislead.

The issue here is whether the information to be obtained was to enable the conductors to defraud the company ; and the possibility of the information being obtained, given to the conductors and used, not incidentally, but wholly and exclusively for other purposes is not in question.

The questions did not and could not tend in any way to disprove the object of the conspiracy nor to throw any doubt on the evidence which had been adduced to shew the end which the conspirators had in view, and they were, therefore, irrelevant and useless. I therefore maintained the objection raised by the Crown prosecutors and over-ruled the questions. I have no doubt as to the correctness of my ruling, and I cannot consequently reserve this question.

The last question of law is that the trial Judge in charging the jury and speaking of the number of witnesses examined on behalf of the accused for the purpose of establishing his good character said : "About forty or fifty witnesses have been examined for the purpose of establishing his good character. It is very strange that it should take forty or fifty witnesses to establish it." This, like the first question, is not a question of law, but in a matter of an irregularity, for which a verdict might be impeached. As a matter of fact, it is a strange circumstance that forty or fifty witnesses should have been examined to prove good character, and the trial Judge violated no rule of law in mentioning the fact and in drawing the attention of the jury

to it. Although it is seldom done, the trial Judge has the right to give his opinion of the evidence and about the case to the jury.

In the case of *The Queen v. Milloy*, which is reported, 6 L.N., p. 102, Mr. Justice Ramsay said in charging the petty jury:—"In matters of this kind one does not desire to augment one's responsibility. It is not for me to pronounce the fatal word, but I should be wanting in my duty if I concealed from you the effect the evidence has had upon my mind. I have only to add that I have no charge to give you as to doubt, for of doubt I have none—nor shall I speak to you of a possible verdict of manslaughter. If the witnesses are to be believed, the prisoner is guilty of murder as laid in the indictment, and I should regard a verdict of manslaughter as a calamity." I have myself refused, when requested to do so by the counsel of an accused, to charge the jury as to doubt when I had none. In the present case, I did not go to the full extent which the law gives to the trial Judge in charging a petty jury. There was nothing illegal in the trial Judge drawing the attention of the jury to the number of witnesses examined as to the character of the accused.

But as the trial Judge in this case, I said more than is mentioned in the motion. I explained the nature and effect of evidence as to character and stated that it could have no effect if the offence charged was clearly proved; but that in cases of the evidence being almost equipoised, or of there being a doubt, the evidence of good character should weigh down the balance in favour of the accused. I cannot reserve this point, and it certainly is not a reason for impeaching the verdict; the question must be disallowed.

I will now take up the second part of the motion, by which the quashing of the verdict is asked for on account of the bias of certain jurors against the accused, of misconduct by the jury or by some of the jurors, and of the alleged disagreement of Joseph Boire, one of the jurors, to the verdict as rendered in Court.

The first illegality complained of is that Harry K. Martin, one of the jurors, was prejudiced against the accused, and that

he had said prior to the trial that if he were selected as a juror he would send the accused to jail, and that when challenged for cause he had declared himself to be indifferent, although he had made up his mind to convict. It appears that the accused and his counsel were not aware before the trial of what Mr. Martin is alleged to have said. The accused produced the affidavits of Messrs. Bochen, Neville & McKaskill to prove that they had heard Mr. Martin say that if he were on the jury he would send the accused to jail, but Mr. Martin swore that he had never said so.

The fact that a juror has made remarks indicating a leaning for or against an accused will not of itself furnish ground for a new trial where the verdict does justice, and there is no reason to suppose that the juror's opinion and conclusion was not derived from the evidence, and a new trial should not be ordered where remarks have been made unless it be shewn that the juror was so prejudiced as to be unable to give the accused a fair and impartial trial.

The affidavits produced do not establish that Mr. Martin was prejudiced, and that by reason of an obvious bias against the accused he was unable to give the accused a fair and impartial trial and to render a verdict according to the evidence, and I am of opinion that the evidence adduced supports and justifies the verdict.

But Mr. Martin was challenged for favour, and the question to be determined was whether the juror would be improperly influenced by any remarks which he might have made or by any bias or by any impression on his mind in the performance of his duty as a juror.

He was examined as to his opinion of the case, whether he had made any remarks about the case, whether he had any bias, and whether he would be able and was disposed to render a verdict in accordance with the evidence to be adduced. It is true that the accused and his counsel were not then aware of the alleged conversation, but he was fully examined as to his opinion of the case, and as to whether he had any prejudice or bias.

against the accused, and the triers declared him to be indifferent and competent; and triers are the judges of the facts, and their finding as to the fact of competency is conclusive and final, and from their finding there is no appeal.

I cannot, therefore, either reserve this point or quash the verdict and order a new trial on this ground.

The second illegality complained of is that the verdict was the result of an arrangement entered into between the jurors that a majority should carry. As regards this allegation I have no evidence. An application for a new trial on the ground of misconduct must be supported by affidavits, which must clearly set forth the facts constituting the alleged irregularity, and in the absence of full proof under oath the presumption exists that the jury properly performed its duty. The solemn declarations of Joseph Boire and John Brady, two of the jurors, were produced, but these declarations do not form and cannot be received as evidence. All oral evidence in any proceeding in a criminal Court must be given under oath or affirmation, and when it is given out of Court for future use in Court it must be upon affidavit. A solemn declaration, in lieu of an oath, may be made in an extra-judicial proceeding, or on an extra-judicial occasion, but it cannot be used and avail in Courts of criminal jurisdiction. The solemn declarations of the two jurors, Joseph Boire and John Brady, do not form evidence nor destroy the presumption that the jury acted properly. Then, upon grounds of public policy, the testimony or the affidavit, or other sworn statement of a juror will not be received to impeach a verdict, or to shew that the jurors agreed on their verdict by a majority, by an average or by lot. In these and other like cases, the Courts have steadily refused to listen to such affidavits.

Here are some of the authorities on this point:—

Stephen, Digest of Evidence, art. 114.—A petty juror may not give evidence as to what passed between the jurymen in the discharge of their duties.

Phipson, Law of Evidence, p. 176.—Neither the testimony nor the unsworn statements of petty jurors are receivable to im-

peach their verdict. Although, however, misconduct connected with the verdict cannot be proved by intrinsic evidence, yet it may be extrinsically, as by the officer in charge of the jurors or by any other actual witness of the transaction.

3. Greenleaf, No. 252a.—On grounds of public policy and for the protection of parties against fraud, the law excludes the testimony of jurors when offered to prove misbehaviour in the jury in regard to the verdict; and the same rule applies to conversation of the jurors together about the case. The settled course is to reject them because of the mischief which may result if the verdict is thus placed in power of a single jurymen. The proper evidence of the decision of the jury is the verdict rendered by them upon oath, and affirmed in open Court.

Taylor on Evidence, p. 814.—Affidavits that verdicts have been decided by lot have been rejected, on motion for new trials, whether such affidavits were sworn by individual jurymen, or by strangers, stating the subsequent admissions of jurors to themselves, or even that a declaration had been made by one juror in the hearing of his fellows in open Court after the verdict had been pronounced. In all cases of this kind the Court must obtain their knowledge of the misconduct complained of either from the officer who had charge of the jury or from some other person who actually witnessed the transaction.

Thompson & Meriam, on Juries, No. 440.—Upon grounds of public policy, the Courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict.

Ibid. No. 414.—Nothing is better settled as a general proposition than the affidavits of jurors are not admissible to impeach their finding. How, then, shall the Court know of their misconduct when a gambling verdict has been returned. Lord Mansfield was confronted with this difficulty in *Vasie v. Delaval* (1 T.R. 11). While conceding the alleged misconduct of the jurors to be a very high misdemeanour, he refused to hear affidavits of certain of the jurors in proof of the fact. "In every such case," said he, "the Court must derive their knowledge from some other

source, such as from some person having seen the transaction through a window, or by some such other means."

There is, therefore, no proof of any misconduct; the solemn declarations furnish no proof whatever, and if instead of solemn declarations the two jurors had produced affidavits, they could and would not have been received. The solemn declarations respecting certain statements made by jurors, made by Joseph Anthime Eliodore Dion and Joseph C. Lussier, as such form no proof and would not even avail if they were in the form of affidavits as they are founded on hearsay and not on their own knowledge. A juror for reasons of public policy cannot shew on oath that he did not agree to the verdict as rendered, or that he consented to it without concurring in it, in order to secure his discharge; neither will the testimony of jurors be received to shew that the jury did not in fact agree upon a verdict, or that the verdict which was rendered was not, in fact, the verdict of the particular jurors.

But while the affidavit of a juror impeaching a verdict cannot be received, affidavits are admissible from the other jurors to support and confirm the presumption that the proceedings of the jury were correct and that there had been no misconduct. The Crown prosecutors have produced the affidavits of nine of the jurors to that effect; so if the evidence of two of the jurors, Joseph Boire and John Brady, was admissible, it would be rebutted by the affidavits of nine other jurors. For, while the testimony of jurors will not be received to impeach their verdict, it does not follow that such testimony will not be received to sustain it when assailed; and if the jurors are accused of misconduct, they may shew by their oaths, not only in their own vindication, but in furtherance of justice, that they were not guilty of the misconduct charged against them. I cannot entertain this objection to the verdict, and it is, therefore, rejected.

The third illegality complained of is that although the juror, Joseph Boire, collectively, with the other eleven jurors, and singly when the jury were polled, declared in Court that the accused was guilty and allowed a verdict of guilty to be recorded, he did

not concur in, and did not really agree to the verdict which was so rendered, and that he had concurred in and had agreed to the verdict which was rendered and recorded because he was told by some of the other jurors that the majority of the jurors were against him, and should carry, and that for his sake they would all be kept in the next day, and because it had been represented to him that he had to follow the majority, and that if he had known that he could prevent the rendering of the verdict by maintaining his opinion, he would have done so, as he believed and still believes the accused to be not guilty.

The only attempt to establish the existence of these allegations was the production of a solemn declaration made by the juror himself, but this solemn declaration does not make any proof whatever in the proceeding raised by the motion of the accused. As I have already stated, a solemn declaration cannot be used to make evidence, and cannot avail as evidence in Courts of criminal jurisdiction. What is set up as constituting an illegality of a nature to vitiate the verdict is, therefore, simply and purely an allegation which is neither supported nor justified in any way by proof. Then, again, if a statement from the juror under oath had been produced instead of the solemn declaration, it would not have made any evidence of the pretended illegality, as the affidavit, the deposition or the the statement under oath of a juror which impeaches a verdict in which he concurred is not, as I have already stated, admissible in evidence. The allegation of this illegality is wholly unsupported, and must, therefore, fail. Then, as laid down by Thompson & Meriam, Nos. 441 and 442, it is not admissible to shew by the oath of a juror that he did not agree to the verdict rendered, or that he consented to the return of the verdict without concurring in it in order to secure his discharge. Neither will the testimony of jurors be received to shew that the jury did not, in fact, agree upon a verdict, or that the verdict, which was rendered, was not, in fact, the verdict of the particular jurors. In the case of *Harrison v. Rowan*, 4 Wash. C.C. 32, one of the jurors who could not agree with the others, said that he was willing to go in Court, and allow the foreman to

deliver a verdict, and if they were polled, that he should declare his dissent; nevertheless, if after that, the jury should again be sent out, that he would agree to the verdict. The jury then came in, were polled, and this jurymen declared his dissent from the verdict. They were again sent out, agreed upon a verdict, returned into Court, were again polled, and each jurymen answered that he agreed to the verdict. It was held that these facts were not sufficient ground for a new trial. In the present case the jury, when they came into Court, declared collectively that the accused was guilty, but when they were polled, Joseph Boire answered "not guilty," and they were sent out, as there was no agreement. When they returned into Court, they all declared collectively that the accused was guilty, and when they were polled, every one of them repeated the same thing singly, and their verdict was recorded. Joseph Boire gave his verdict upon oath, and in open Court. Which must prevail, the verdict rendered publicly, and upon oath or his statement contradicting such verdict? Can he be allowed to shew his own turpitude, and by public policy, and under general principles, which oath should prevail, his oath as a juror to render a verdict according to the evidence, or the oath by which he may seek, when perhaps pressed and worried by the friends of the accused, to vitiate his own solemn act? The last thing that a Court should, and will listen to, is the affidavit of a juror contradicting the verdict which he has solemnly rendered in open Court, under the obligation of his oath as a juror. If he does not agree to the verdict when it is pronounced in Court, he must speak then, or for reasons of public policy thereafter hold his peace.

Then, I have before me the affidavits of nine of the jurors which were given and produced to support and confirm the presumption that all the proceedings of the jury and of the individual jurors were correct, and that there had been no misconduct, and these nine jurors contradict on oath the statement of the juror Joseph Boire, and state positively that no undue representations were made to him, and that no pressure whatever was exercised upon him to induce him to concur in a verdict with

the other jurors, and that he agreed to and rendered his verdict of guilty of his own free will.

I cannot entertain this objection to the verdict, and it is consequently rejected.

I will now take up the third and last part of the motion, by which leave is asked on behalf of the accused, to be allowed to apply to the Court of Appeal for a new trial on the ground that the verdict is contrary to the evidence.

I heard all the evidence adduced, and I am clearly and undoubtingly of opinion that there was evidence to authorize a verdict of guilty, that the verdict is supported and justified by the weight of the evidence, and that the verdict is a proper and legal one. Under these circumstances I cannot grant the leave asked for to be allowed to apply to the Court of Appeal for a new trial.

The motion as a whole is dismissed.

Motion dismissed.

N.B.—An application to the Court of Appeal for leave to appeal was subsequently made and dismissed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., IN CHAMBERS.

THE KING v. POWER.

Finding sureties to keep the peace—Costs ordered against defendant—Imprisonment for non-payment only authorized in default of distress—Crim. Code, secs. 870, 959.

1. Upon a proceeding under section 959 of the Criminal Code to compel the giving of a recognizance to keep the peace, the recovery of costs ordered against the defendant is governed by Code section 870 and imprisonment for non-payment is only authorized in default of distress.

DECIDED: November 25, 1902.

A complaint on oath was laid by William Gorman against George Power, the prisoner, on the 18th day of November, A.D. 1902, charging him with using threats of personal injury and praying that he might be required to find sufficient sureties to keep the peace, and stating that he did not make this complaint against nor require such sureties from the said George Power from any malice or ill will, but merely for the preservation of himself and his family from bodily injury.

After an investigation on the said complaint the prisoner was ordered on the 21st day of November, 1902, by John McDougall, Esquire, Stipendiary Magistrate in and for the County of Halifax, to enter into his own recognizance in the sum of \$100 with two sufficient sureties in the sum of \$50 each to keep the peace and be of good behaviour, etc., towards the said William Gorman and his wife and family for the space of twelve months next ensuing, and to pay to the said William Gorman, the prosecutor, the sum of \$1.40 for his costs in this behalf; and on refusal or neglect to enter into such recognizance and to find such sureties forthwith, and if the said sum for costs were not paid forthwith, the prisoner was adjudged to be imprisoned in the county jail at Halifax for the space of one month, unless said recognizance was sooner entered into

and the said sureties sooner found and the said sum for costs sooner paid.

The prisoner having refused to comply with this order was committed to jail under a warrant of commitment signed by the said Magistrate in the terms of and after reciting the above order.

On notice to the prosecutor and the committing Magistrate after a return by the keeper of the common jail at Halifax of a warrant of commitment in the terms of the Magistrate's order (Form Y.Y.Y. varied to suit the case), to a writ of habeas corpus issued by order of Weatherbe, J., a motion was made for the discharge of the prisoner on the following grounds:—

(1) That the said costs could be collected only by distress and in default of distress, imprisonment, and not imprisonment in the first instance.

(2) That it was uncertain from the order and warrant whether the imprisonment was a means of enforcing the payment of the costs or the entering into of the said recognizance and the finding of the said sureties.

HALIFAX, N.S., November 25, 1902.

John J. Power, for the prisoner.

Joseph B. Kenny, for the prosecutor.

WEATHERBE, J., gave judgment after the argument, holding that secs. 959 (3) and 870 of the Criminal Code gave the authority and procedure respectively for imposing and collecting the costs in a case like the present, and that under the last mentioned section the defendant could be imprisoned for the non-payment only in default of distress. The order in awarding imprisonment without distress as a means of recovering these costs was therefore bad as an excess of jurisdiction, and the prisoner held thereunder was entitled to be discharged, the usual protection against civil action being extended to the sheriff and the jailor.

Prisoner discharged.

Note:—*Costs on finding sureties to keep the peace—Cr. Code. sec. 959.*

Section 959 of the Code provides, by sub-sec. 2 thereof, that "upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife, or child, some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and be of good behaviour, for a term not exceeding twelve months."

This is contained in Part LXV. of the Code which relates to "Sureties and fines," but another sub-section of 959 declares that the provisions of Part LVIII. (i.e., the "Summary Convictions" clauses) shall apply, so far as the same are applicable, to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint. Section 959 also expressly declares that if any person so required to enter into his own recognizances or give security as aforesaid, refuses or neglects so to do, the same or any other justice may order him to be imprisoned for any term not exceeding twelve months.

Imprisonment in the first instance in default of finding sureties is the only appropriate mode of enforcing the order of the justice, but, if costs are awarded against the defendant, Part LVIII. then applies so far as its provisions are applicable. In Part LVIII. is found section 872 which, as amended 1894 and 1900, authorizes imprisonment in the first instance and without distress upon default of payment of a penalty and costs; but the section only applies when "a conviction adjudges a pecuniary penalty or compensation to be paid" or when an order of the justice "requires the payment of a sum of money."

Section 867, which is also in Part LVIII., provides that in every case of a summary conviction, *or of an order made by a justice*, such justice may, in his discretion, award and order in and by the conviction *or order*, that the defendant shall pay to the prosecutor or complainant, such costs as to the said justice seem reasonable in that behalf and not inconsistent with the fees established by law to be taken on proceedings had by and before justices.

Where there is neither a conviction nor an order (i.e., against the defendant), the next following section (868) authorizes the justice, on dismissing the complaint, to order costs against the complainant. and section 869 declares that any costs allowed shall be recoverable in the same manner and under the same warrant as any penalty adjudged to be paid, but that the costs when allowed must be specified in the conviction or order. Then follows section 870 which by the decision in *The King v. Power, supra*, is held to apply to complaints before justices under sec. 959 (2) to compel the giving of recognizances to keep the peace.

Note—Continued.

Costs on finding sureties to keep the peace—Cr. Code sec. 959.

Section 870 is as follows:—

Whenever there is no such penalty to be recovered, *such costs* shall be recoverable by distress and sale of the goods and chattels of the party, and, in default of distress, by imprisonment with or without hard labour for any term not exceeding one month."

The words "such costs" as used in the section would seem to have reference to all of the three sections preceding it (867-869 inclusive), and it seems to follow that the "requiring" of a recognizance under sec. 959 (2) is an "order made by a justice" in the terms of sec. 867 and is subject to such of the provisions of the "Summary Convictions" clauses (Part LVIII.) as relate to justice's "orders" as can be made applicable thereto (sec. 959 (3)).

[THE SUPREME COURT OF CANADA.]

BEFORE SIR ELZEAR TASCHEREAU, C.J., AND SEDGEWICK,
GIROUARD, DAVIES AND MILLS, JJ.

ATTORNEY-GENERAL v. SCULLY.

Leave to appeal to Supreme Court of Canada—Special leave only upon special grounds other than error—Control by provincial courts of court records—Exemplification of proceedings in criminal prosecution—Mandamus to clerk of the peace—Crim. Code, secs. 654, 726.

1. Where an appeal lies from the Court of Appeal for Ontario to the Supreme Court of Canada, only where special leave is obtained from either of said Courts, leave should be refused unless special reasons are shewn apart from the alleged error in the decision sought to be reviewed.
2. The control exercised by provincial courts over their own records and their own officers should not, as a general rule, be interfered with by the Supreme Court of Canada on appeal from a provincial court.

ARGUED: December 2, 1902.

DECIDED: December 9, 1902.

APPLICATION on behalf of the Attorney-General for Ontario for special leave to appeal from the Court of Appeal for Ontario to the Supreme Court of Canada, under Canada Statutes, 1897, 60 & 61 Vict., c. 34, s. 1 (e).

The decision sought to be appealed from, reported ante, page 167, had declared the right of the respondent to a prerogative writ of mandamus to the Clerk of the Peace to furnish the respondent Scully with an exemplification of the record in criminal proceedings taken against him in a Court of General Sessions in Ontario, upon which the respondent had been acquitted.

The material parts of the statute under which the special leave to appeal was applied for are as follows:—

Whereas by Acts of the Legislature of the Province of Ontario it is provided to the effect hereinafter mentioned with respect to appeals to the Supreme Court of Canada, and it is desirable to confirm hereby the provisions of the said Acts: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. No appeal shall lie to the Supreme Court of Canada from any judgment of the Court of Appeal for Ontario, except in the following cases:—

(a.) Where the title to real estate or some interest therein is in question;

(b.) Where the validity of a patent is affected;

(c.) Where the matter in controversy in the appeal exceeds the sum or value of one thousand dollars, exclusive of costs;

(d.) Where the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights;

(e.) In other cases where the special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted;

(f.) Whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded, not that recovered, if they are different.

OTTAWA, December 2, 1902.

Cartwright, K.C., Deputy Attorney-General, in support of the motion referred to *Lusty v. McGrath*, 6 U.C.O.S. 340; *Reg. v. Ivy*, 24 U.C.C.P. 78; *Hewitt v. Cane*, 26 O.R. 133.

Arnoldi, K.C., contra.

OTTAWA, December 9, 1902

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion on behalf of the Attorney-General for Ontario for leave to appeal under paragraph (e) of section 1, of 60 & 61 Vict. c. 34 (D.) from a judgment of the Court of Appeal for Ontario. The history of the case is as follows:—

In March, 1900, the respondent, Scully, was arrested upon an information laid by one Louis Peters, charging him with having feloniously stolen forty-one saw-logs, the property of the said Peters. After trial in due course of law the said Scully was acquitted by the jury. He thereupon brought an action against the said Peters claiming damages for malicious prosecution. It being necessary for him at the trial to have a copy of the indictment and of the record of his acquittal to prove the essential allegations of his said action, he applied for them to the Clerk of the Peace in whose custody they were. The Clerk of the Peace and Peters' solicitor happened to be one and the same person. That officer, prompted, it must be assumed, by what he believed to be his duty, refused to give them without the fiat of the Attorney-General, and that fiat was, subsequently, refused. Thereupon, Scully applied for a prerogative writ of mandamus to compel the said Clerk of the Peace to deliver him a copy of the said documents. This application was dismissed by Falconbridge, C.J. (K.B.), but granted by the Divisional Court, 5 Can. Cr. Cas. 1; 2 O.L.R. 315, upon an appeal by Scully. Upon an appeal to the Court of Appeal, on behalf of the Attorney-General, the judgment of the Divisional Court was affirmed, 6 Can. Cr. Cas. 167; 4 O.L.R. 394. The Attorney-General now moves for leave to appeal from that last judgment.

The motion cannot be granted. This statute, 60 & 61 Vict. c. 34(D.), clearly takes away the right to appeal to this Court from the Court of Appeal for Ontario in all the cases not coming within paragraphs (a), (b), (c) and (d) thereof. Now, when in paragraph (e) it allows an appeal in any other cases wherein the special leave of the Court of Appeal for Ontario or of this Court to appeal to this Court is granted, it seems evident that, to grant that special leave upon the ground only that the Court of Appeal has erred in the judgment attempted to be appealed from, would be to render the Act nugatory and to defeat the manifest intention of Parliament to restrict the right of appeal. There must be special reasons to support an application of this nature and none has been advanced in support of this application that cannot apply to the numerous cases where the unsuccessful party thinks that the judgment is wrong. What those reasons must be we have not to determine here. All that we hold is that in this case none has been given to support of the motion sufficient to justify us in granting it. Public interest might perhaps have justified us in granting special leave had the Attorney-General succeeded in establishing his contention that a right of action which the law gives to the subject is dependent upon the discretion of the law officers of the Crown. But as the judgment of the Court of Appeal rejects this contention of the Attorney-General, it cannot be contended that it is in the interest of the public at large that an appeal from that judgment should be granted.

I refer to the six cases in which motions of this nature have been made since the said Act came into force, not a single one of which has been granted, to shew that under our jurisprudence such leave cannot be granted upon the ground only that there may be error in the judgment of the Court of Appeal:—

1898, May 20th; *Fisher v. Fisher*, 28 Can. S.C.R. 494. Leave refused.

1901, March 6th; *Grand Trunk Railway Company v. Atchison*, (not reported). Leave refused.

1901, March 18th; *Grand Trunk Railway Company v. Vallee*, (not reported). Leave refused.

1901, October 1st; *Dominion Council of Royal Templars v. Hargrove*, 31 Can. S.C.R. 385. Leave refused.

1901, October 29th; *Robinson v. Toronto Street Railway Co.* (not reported). Leave refused.

1902, June 9th; *Town of Aurora v. Village of Markham*, 32 Can. S.C.R. 457. Leave refused.

The application, by the Statute, may also be made to the Court of Appeal itself. Now, no one would, I think, apply to that Court for special leave to appeal to this Court upon the ground only that the judgment is wrong. And what cannot support an application in that Court cannot support it in a Court of concurrent jurisdiction, as we are, in this matter.

There is another view of the case upon which this application should not be granted.

The controversy relates to what may be considered in a great measure but a question of practice. It is treated generally as such in most of the cases cited in the Provincial Courts. Then the contention of the Attorney-General is principally based upon rules of practice for the Old Bailey Court made by the Judges in the year 16th Car. II. (Kel. C.C. 3). In one aspect of the question the right claimed by the respondent may not, strictly speaking, fall exclusively within the words practice or procedure, but the control of the Provincial Courts of justice over their own records and their officers should not, as a general rule, be interfered with by this Court. And, when the Court of last resort in the Province has passed upon a question of this nature, we should refrain from exercising the discretionary power as to Ontario appeals that the statute under which the application is made confers upon us.

Motion refused with costs.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, J., GRAHAM, E.J., AND
MEAGHER, J.

THE KING v. COHON.

*Speedy trial—Adding new charge—Previous leave of Judge necessary—
Perjury in affidavit used in civil action—Stating the offence—Several
charges on one affidavit—Affidavit an entire statement not severable—
Postponing perjury trial pending the civil action—Regularity of re-
served case—Remitting all the evidence on question of sufficiency to
convict—Crim. Code, secs. 146, 601, 743, 773.*

1. When the accused has elected a "speedy trial" under Part LIV. of the Code upon charges in respect of which he has been bound over to answer an indictment, a new charge cannot be added in the County Court Judge's Criminal Court without the leave of the Judge, although founded upon the same depositions.
2. The consent of the Judge under the Speedy Trial Clauses to prefer another charge against the accused must be obtained before the charge is preferred.
3. A charge of perjury is defective as not disclosing a crime, if it does not allege that the statement was sworn to knowing the same to be false, or if such is not the necessary inference from what is alleged, apart from the declaration in the charge that the accused "thereby committed wilful and corrupt perjury."
4. Upon a "speedy trial" upon several charges of perjury in respect of one affidavit, the trial Judge is bound to regard the whole affidavit as the sworn statement in respect of each charge, and should not treat each paragraph of the affidavit as an entire statement independently of the other paragraphs.
5. *Semble*, where a charge of perjury is brought on for trial during the pendency of the civil action in which it is alleged to have been committed and where the question of fact on which the perjury is alleged is the same as that involved in the civil action, the criminal court should exercise its discretion to postpone the criminal trial until after judgment in the civil action.
6. The Judge reserving a case for the Court of Appeal as to the sufficiency of the evidence to sustain a conviction should either state the effect of the evidence given or extract the material parts of the evidence and reserve a question as to its sufficiency, and he should not send up the whole body of the evidence upon a question of law as to whether the same is or is not sufficient to convict.

ARGUED: February 6, 1903.

DECIDED: March 10, 1903.

THE defendant, Philip Cohon, was examined before a Stipendiary Magistrate for the County of Cape Breton and bound over

under section 601 of the Code to answer an indictment that might be found against him in respect of certain specific charges of perjury. He subsequently appeared before His Honor Judge Dodd, Judge of the County Court Judge's Criminal Court, District No. 7, and consented to a Speedy trial under Part LIV. of the Code, and on the appointed day was arraigned on said specific charges and an additional charge (referred to in the proceedings as charge 3), which added charge was also perjury, and was framed from the depositions respecting the other charges. The Judge reported that "the Crown did not obtain leave under section 773 of the Criminal Code or otherwise to have this added charge 3 tried, nor did the prisoner consent to a trial thereon."

The facts out of which the case arose were that one E. G. Gittleson and one C. H. Miller, who did business in Newfoundland as the United States Picture and Portrait Company, being the payee of a promissory note for \$250, brought action against the Sydney Household & Supply Company, the makers of said note, for the amount thereof and \$2.54 protest fees. The latter having entered an appearance in said action, the former, through their solicitor, commenced proceedings under Order XIV of the N. S. Judicature Rules to set aside said appearance and for an order for judgment on their said claim.

The prisoner, on advice of counsel, made an affidavit in resistance of said motion, and the alleged perjury was contained therein. It was charged that in said affidavit he falsely, wilfully and corruptly swore in substance and to the effect following:—

(1) That Michael Miller never was a partner in the Sydney Household and Supply Company.

(2) And also in the said affidavit the said Philip Cohon did falsely, wilfully and corruptly depose and swear in substance and to the effect following:—That a certain sum of two hundred and fifty-two dollars and fifty-four cents, sued for in said action, was not, nor was any other sum ever *received by the said defendants from the said plaintiffs*, whereas the said sum of two hundred and fifty dollars and fifty-four cents, the amount of said promissory note sued for

in said action, and parcel of said sum of two hundred and fifty-two dollars and fifty-four cents, was *received by the said defendant firm*, and the said Philip Cohon did thereby commit wilful and corrupt perjury.

(3) And also in the said affidavit the said Philip Cohon did falsely, wilfully and corruptly depose and swear in substance and to the effect following:—That the said promissory note for two hundred and fifty dollars was signed by the said defendant company, as accommodation paper and for the accommodation of the said plaintiffs, whereas in truth the said note was not signed by the said defendant company as accommodation paper for the accommodation of the said plaintiffs but was signed by the said defendant company for monies loaned and advanced by the said plaintiffs to the said defendant company, and the said Philip Cohon did thereby commit wilful and corrupt perjury.

(4) And also the said Philip Cohon in said affidavit did falsely, wilfully and corruptly depose and swear in substance and to the effect following:—That the said defendants *received no consideration from the said plaintiffs* for said promissory note for two hundred and fifty dollars, whereas in truth the said defendant company *received two hundred and fifty dollars for said note*, and the said Philip Cohon did thereby commit wilful and corrupt perjury.

The trial Judge found the prisoner not guilty upon charge (1) and guilty upon the three other charges.

The evidence was sent up in full to the Supreme Court of Nova Scotia, sitting as a Court for Crown cases reserved, but epitomized it was as follows:—Charles H. Miller was a member of the United States Picture and Portrait Company, which did business in Newfoundland. Charles Miller's brother, Michael, was desirous of becoming a partner in the Sydney Household and Supply Company, and while at Sydney made application with that object to the prisoner and Blumenthal, the members of the firm. Blumenthal was Michael Miller's brother-in-law, and the latter was staying at the former's house while in Sydney. Michael

Miller had no money with which to buy the required partnership, so Blumenthal and the prisoner recommended him to apply to his brother Charles in Newfoundland for \$450, and for this sum they would receive him into the firm. Michael Miller went to Newfoundland with this purpose in view, and shortly afterwards Charles Miller wrote the Sydney Household and Supply Company, asking them to sign two promissory notes to his firm for four hundred and fifty dollars, stating that he would then be able to raise the money on them for Michael Miller to enter the Sydney firm. The Sydney Household and Supply Company signed and sent to C. H. Miller two promissory notes, of which that referred to in these proceedings is one. Several days after the arrival of these notes in Newfoundland, C. H. Miller gave to Michael Miller a cheque for four hundred and fifty dollars, payable to the latter's own order. Michael Miller returned to Sydney, and after the lapse of some days, and at the instigation of Blumenthal, to whom Michael Miller had mentioned that he had this cheque, Michael Miller handed over said cheque to the prisoner without making any arrangement as to partnership, and the prisoner deposited same in bank, to the credit of the account of the Sydney Household and Supply Company. The evidence did not establish that there was ever any formal partnership arrangement between the prisoner Blumenthal and Miller, but the latter went to work in their store selling goods under arrangement with Blumenthal.

Blumenthal and the prisoner appeared to have regarded the transaction respecting the four hundred and fifty dollars as a matter of debt between themselves and Michael Miller, while the latter contended and supposed that he was a partner. The prisoner on the occasion of making the affidavit in question, acquainted his solicitor with the facts as above recapitulated, and the latter consulted counsel. A conference was held between the now prisoner and his solicitor and counsel; the latter advising that upon the facts as related to him the note in question was accommodation paper for C. H. Miller's benefit. The Newfound-

land Company, as a matter of fact, held the notes till due and did not discount them.

The opinion of the Court was asked upon the following among other points:—

“(a) The prisoner consented to be tried before me for perjury on the deposition as returned by R. M. Langille, Stipendiary Magistrate in and for the County of Cape Breton. Charge 3 was not contained in the information in the Magistrate’s Court, but was contained in the charge preferred by the Crown Prosecutor before me. Was I right in trying him on said charge 3, under the general charge of perjury, without the prisoner having specifically elected to be tried on the charge of perjury as set out in said charge 3?”

“(b) In view of all the contents of the prisoner’s said affidavit, and the evidence of the case as hereto attached, is any offence disclosed in charge 2?”

“(c) In convicting the defendant, I considered each charge separately without reference to the other allegations in the affidavit. Was this correct, or ought I to have considered the affidavit as a whole in respect to each of the charges?”

“(g) Is there any rule of law, which should restrain or prohibit me from proceeding to convict upon a charge of perjury alleged to have been committed in the making of an affidavit in a suit still pending upon matters which were at issue and to be decided in said pending suit? If so, the objection having been taken that I ought not to proceed, is my conviction under said charges 2, 3 and 4, under the circumstances, void or voidable, or is the defendant entitled to any, and if so, what relief?”

“(h) Is there any legal evidence to sustain charges 2, 3 and 4, and is conviction based on the evidence hereto attached proper?”

HALIFAX, N.S., February 6, 1903.

C. S. Harrington, K.C., John J. Power and W. F. O'Connor,
for the prisoner.

A. Cluney and H. McInnes, for the Crown, contra.

HALIFAX, N.S., March 10, 1903.

TOWNSHEND, J.:—The learned County Court Judge convicted the defendant on several charges of perjury alleged to have been committed in swearing to an affidavit used in a cause in the Supreme Court. He reports that "the Crown did not obtain leave under section 773 of the Criminal Code or otherwise to have this added charge 3 tried, nor did the prisoner consent to a trial thereon, but on the evidence adduced, which I now recapitulate, I acquitted him on the first charge, and convicted him on charges 2, 3 and 4."

He then adds: "The prisoner consented to be tried before me for perjury on the depositions as returned by R. M. Langille, Stipendiary Magistrate in and for the County of Cape Breton. Charge 3 was not contained in the information in the Magistrate's Court, but was contained in the charge preferred by the Crown prosecutor before me. Was I right in trying him on said charge 3 under the general charge of perjury without the prisoner having specially elected to be tried on the charge of perjury as set out in said charge 3."

It seems very plain that the Judge could not try the prisoner under charge 3, at least without his, the Judge's, consent expressed in some way.

Section 773 of the Code says:—

"The County Attorney, or Clerk of the Peace, or other prosecuting officer, may, with the consent of the Judge, prefer against the prisoner a charge or charges for any offence or offences, etc., etc., other than the charge or charges for which he has been committed for trial."

This consent must be before the charge is preferred. The Judge reports this was not done before or at any time. By sec-

tion 767 after the prisoner elected to be tried it directs that "the officer shall prefer the charge against him for which he has been committed for trial," and draw up a record, etc. The conviction therefore on this charge is bad and must be set aside.

The second reserved question is as follows:—

"In view of all the contexts of the prisoner's said affidavit, and the evidence of the case as hereto attached, is any offence disclosed in charge 2?"

Charge 2 is as follows:—That the said Philip Cohon did falsely, and etc., swear in substance and effect following:—"That a certain sum of two hundred and fifty dollars and fifty-four cents sued for in said action was not, nor was any other sum ever received by the said defendant from the said plaintiffs, whereas *the said sum of two hundred and fifty dollars and fifty-four cents, etc., was received by the said defendant firm, and the said Philip Cohon did thereby commit wilful and corrupt perjury.*"

There is no allegation in the charge that the prisoner knowing that the defendant firm had received the money, so corruptly swore, etc., and surely one of the elements of the crime of perjury is that the accused knowing the fact swore to the contrary—swore to what he knew to be false. What constitutes perjury is defined in section 148 of the Code, sub-sec. (b): "Knowingly, wilfully and corruptly, etc., subscribed any, etc., etc., affidavit, etc." Again, in the light of the evidence what he said was literally true. It is not averred that the defendant received the money from the plaintiff in the action, and as a matter of fact it was received from Michael Millar. I think, therefore, no crime or offence was charged in No. 2, and that second conviction must be set aside.

In the next reserved question it appears the learned Judge in convicting the prisoner "considered each charge separately" without reference to the other allegations in the affidavit, and asks whether he should have considered the whole in respect to such charge. I am most clearly of opinion that he was wrong in thus dealing with the evidence before him, especially an affidavit, and

that he was bound to read and weigh the statements as a whole in arriving at a conclusion on the guilt or innocence of the accused. In this particular case to have considered the whole affidavit might or might not have affected his judgment, but it would be a most pernicious principle to sanction that in a trial for perjury a Judge, or in a case of trial by jury, the jury, might have excluded from their consideration the whole evidence relating to a particular charge. One portion of the affidavit not regarded might have qualified and explained that part which was charged as perjury. This objection applies to all the charges on which the prisoner was convicted, and in my opinion alone is sufficient to require us to set aside the whole conviction.

After expressing the above views it seems unnecessary to deal with the other points reserved. I cannot refrain, however, from saying in reference to one of them that this charge should not have been brought during the pendency of the civil action in the Supreme Court, although I know of no legal rule to prevent the prosecutor making the charge. I think further if it comes to the knowledge of the Court that a suit is pending involving the very question on which the perjury is alleged, it has the discretion which would be wisely exercised to defer the trial of the criminal charge until the suit is determined. I may add in conclusion that it is not competent for the Judge below to submit such a question as the last, whether there is any legal evidence to sustain the conviction—and send up the whole evidence for us to review. He may state the effect of evidence given to sustain a certain charge or give the material part of it, and reserve a question as to its sufficiency in point of law to convict, but it certainly was never contemplated that he could send up the whole body of the evidence, and ask if that evidence is sufficient to convict.

In my opinion the conviction must be set aside and the prisoner discharged.

MCDONALD, C.J., concurred with TOWNSHEND, J.

GRAHAM, E.J.:—The prisoner was tried for perjury in the County Court Judge's Criminal Court under the provisions relating to speedy trials.

This was the affidavit in a civil action, used on a motion to strike out an appearance, in respect to which he was convicted upon three different charges:—

“I, Philip Cohon, of Sydney, in the County of Cape Breton, merchant, make oath and say as follows:—

1. I am a member of the above firm.
2. The defendant firm is composed of H. Blumenthal and myself only.
3. Michael Millar is not now, and never was, a member of the defendant firm, as alleged in paragraph 2 of the affidavit of A. A. McIntyre in this application.
4. The said Michael Millar is a brother of the said C. H. Millar, one of the plaintiffs herein.

5. Neither the sum of two hundred and fifty dollars and fifty-four cents, or any other sum, *was received by the defendants from the plaintiffs, but the said Michael Millar, as I am informed by him, and verily believe, received the said amount.*

6. I have read the affidavit of A. A. McIntyre filed herein the 10th day of August, A.D., 1902, and say with reference to paragraph 5 of the said affidavit, that I did not instruct the said A. A. McIntyre that the defendant had written the plaintiffs offering to pay in cash. What I did say was that the said Michael Millar had written the plaintiffs in reference to the matter, which fact I had been informed of by the said Millar, and verily believe.

7. I am instructed by counsel and verily believe that the defendants have a good defence to this action on the merits.

8. The said note was signed by the defendant company as accommodation paper and *was for the accommodation of the plaintiffs. The defendant company received no consideration from the plaintiffs therefor.* Said defence to this action goes to the whole action.

9. (The said advertisement was purely to catch trade and the said partnership still continues between myself and H. Blumenthal.'')

One charge was upon paragraph 5, the allegations about the defendants receiving the money from the plaintiffs.

Another charge was in respect to the allegation that the defendant company received no consideration from the plaintiffs for signing the note.

The charge which in the case is called No. 3 was in respect to the allegation that the note was signed by the defendant company as accommodation for the plaintiffs.

It appears that one Michael Millar got money from the U.S. Picture Company (the plaintiff in the civil action) in which his brother was a partner, upon a note made payable to it by the S. H. & S. Company (the defendants). The money was to be used by him to buy a partnership in the latter company. The picture company brought an action against the supply company upon the note, and the defendants relied upon the defence that they had signed the note for the accommodation of the picture company. In support of this defence and to resist the plaintiff's application to strike out the appearance, Cohon, a member of the defendant company, made the affidavit in question. There is a case reserved by the Judge.

Dealing with the so-called third charge, first it appears that this charge was not in the information sent up by the magistrate and that the prisoner was not committed upon it. It was added by the Crown without obtaining leave under section 773 of the Code, so the Judge reports, and after the prisoner had consented to be tried before him and without his consenting again.

In my opinion the conviction on this charge must be quashed. I put it simply on the ground that the Judge had not granted leave to add the charge. *Reg. v. Findge* (1864), 9 Cox Cr. Cas. 430.

Inasmuch as there was in all probability no evidence given under that charge alone which would not have been received under the other charges, it is doubtful if the convictions on the

other charges on account of the illegality of the trial on the third charge, ought under the authority just cited to be quashed, and I propose to deal with them separately.

One is in respect to a statement which is literally true under the evidence. It was Millar who actually received the money. He did not receive it as the defendant's agent. The money was not for the defendants. It was to be used by him to purchase this share in the partnership from them.

Then the other charge in respect to this allegation: "The defendant company *received* no consideration *from the plaintiffs therefor*, that is, signing the note."

This allegation was an irrelevant and insufficient answer in law to the application because it did not also deal with the fact that the defendants were holders for value (The Bills of Exchange Act, ss. 28 and 27, s.-ss. 2 and 3), but it was true in fact. The consideration in law was not something of value received by the defendants from the plaintiffs, but the detriment suffered by the picture company in advancing their money to Millar for the note. Of course there was consideration in law, but the defendants received none from the plaintiffs. This statement would I think not mislead justice.

If it is said he should not have made such an allegation, it must be remembered that consideration is often a question of law. It is so here, and I can understand a man where he had received nothing for himself from the plaintiffs, not being clear about it, particularly in this case, when there was a bona fide dispute as to the relative position of the parties in respect to that note.

In my opinion the convictions must all be quashed.

MEAGHER, J.:—The conviction must be quashed, firstly, because the Judge should have regarded the affidavit in its entirety and not try the accused piecemeal for an offence which consisted of one act having relation to one subject matter.

Secondly, the evidence did not sustain a charge of wilful and corrupt perjury nor an intention to mislead justice.

Thirdly, the charge numbered "two" in the stated case, assuming it to be sufficiently stated, was proved to be untrue. The money was received from Michael Miller, and not from the plaintiff in the action. The charge was, however, not stated so as to constitute an accusation of perjury upon the affidavit in that it did not aver that the statement in the affidavit that he had not received the money, from the plaintiffs, was wilfully and corruptly false.

Fourthly, the charge numbered four is open to the objection just mentioned. In order to substantiate a charge of perjury in this particular, assuming the charge to be sufficient, very clear proof is required to show that the note was given to secure the loan or advance the plaintiffs were making to Michael Millar. Upon that point there is to say the least enough evidence in defendant's favor to make it quite impossible for me to say that he swore falsely and corruptly when he said that the defendants received no consideration from the plaintiffs for the note. Moreover, it is not alleged that he received it in fact from the plaintiffs.

Lastly, I am unable to conclude that he could have been legally tried upon charge No. 3 without the express consent of the Judge, which was not given. In order to make the proceeding regular there should, I think, have been an order or something equivalent to it, giving the leave so that it would appear as matter of record.

I desire to add that the case is not properly stated, *Coppen v. Moore*, 67 L.J.Q.B. 689, 694, but still it is in such a shape as to permit it being considered.

Conviction quashed.

Note: *Indictment for perjury—Stating the offence.*

By sec. 982 of the Criminal Code the several forms in the schedule thereto "varied to suit the case or forms to the like effect" are to be deemed good, valid and sufficient in law. Two of such statutory forms relate to the offence of perjury and are as follows (Form FF (d) and (e)):

(d) "A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely

Note—Continued.

Indictment for perjury—Stating the offence.

robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the — day of —, 1879; first, that he, A., saw B. at Ottawa on the — day of —; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.”

(e) “The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on —, for an assault alleged to have been committed by the said B. on C. at Ottawa, on the — day of —, by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.”

An indictment following the statutory form has been held in the Province of Quebec to be sufficient if it charges that the accused “committed perjury” by swearing that, etc., (specifying the false oath), without including a specific statement that it was so done knowing the same to be false. *R. v. Bain* (1877), Ramsay’s Cases (Que.) 192; *R. v. Bowles*, Ramsay’s Cases (Que.) 192. These cases seem to be in direct conflict with the decision reported above, as to head-note number 3 thereof.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., IN CHAMBERS.

THE KING v. HAYWARD.

Theft under \$10—Summary trial—Trial before town police magistrate—Limit of punishment is six months' imprisonment—Section 785 excludes cases where section 783 applies—Marginal note, "in certain other cases"—Crim. Code, secs. 752, 783, 785, 787.

1. The punishment upon summary trial for the theft of property not exceeding \$10 in value (and not being the offence of stealing from the person) is governed by Code sections 783 and 787 and is therefore limited to six months' imprisonment.
2. In view of the marginal note to Code section 785, i.e., "summary trial in certain other cases," section 785 should be considered as applying only to cases not specifically mentioned in section 783.
3. Where the imprisonment directed by a warrant of commitment is in excess of that authorized by law, and the partial imprisonment actually served thereunder is of a different class to that specified in the warrant, the Court on habeas corpus should not order further detention under sec. 752 although the accused had pleaded guilty to the charge.

ARGUED : December 8, 1902.

DECIDED : December 12, 1902.

Motion for the discharge from custody, on the return of a writ of *habeas corpus*, of one Robert Hayward, a prisoner in the central prison, under the circumstances set out in the judgment.

TORONTO, December 8, 1902.

E. E. A. DuVernet, and *G. J. Smith*, for the motion.

Frank Ford, for the Attorney-General.

TORONTO, December 12, 1902.

BOYD, C.:—The information and complaint is against the defendant for stealing eighty cents out of the contribution box in the Congregational church at Paris.

According to the return made by the magistrate he pleaded guilty and was committed for the term of two years to the provincial reformatory.

It appears that the police magistrate was informed that the defendant was over seventeen years of age, and that is now sworn to.

When taken to the reformatory he was received there, only to be sent on to the central prison. The defendant is now in custody in the central prison under the warrant of commitment to the reformatory.

It is said that being over sixteen years of age he was not received by the superintendent of the reformatory, and was in some informal way turned over to the warden of the central prison.

The reformatory is recognized by the Dominion Government as a proper place of criminal custody for boys under the age of sixteen years (R.S.C. 1886, ch. 183, sec. 25).

It has not been pointed out to me what provisions were made for the dealing with youths over sixteen years of age committed to the reformatory by the magistrate under the erroneous opinion that he does not exceed sixteen years, in order that they may be placed in proper custody.

Here there has been a miscarriage of legal directions, first in sending a lad over seventeen years to the reformatory, and next in sending him on a sentence of two years to the central prison.

The sentence for a term of years not less than two is to the penitentiary; only to the central prison if less than two years: Crim. Code, sec. 955; R.S.C. 1886, ch. 183, sec. 19.

Upon the papers before me, there appears to be no legal authority to authorize the warden of the central prison to receive or retain this defendant.

Is it a case for further detention or for the direction of further proceedings under section 752 of the Code in regard to one who is no doubt guilty of the offence charged?

This leads one to consider the facts, which brings the whole proceeding under the authority of *Regina v. Randolph* (1900), 32 O.R. 212, 4 Can. Cr. Cas. 165.

The offence charged was stealing a small sum of money, much less than ten dollars, and so it falls to be dealt with under section 783 of the Code.

It was argued that it might be regarded as coming under section 785, and so the sentence of two years' imprisonment be justified. But I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial "in certain *other* cases" than those enumerated specifically in section 783. Where the offence is charged and in reality falls under section 783 (a), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months: section 787.

The defendant has been imprisoned since the 2nd of October, and is not now in lawful custody. As a first offender, he has perhaps been sufficiently convinced that it is not advisable to depart from the paths of honesty, and in hope that he may not again offend I now order his discharge.

The usual term of "no action to be brought against any one" is imposed as a condition of this discharge.

Prisoner discharged.

Note: Summary trial for theft—Cr. Code secs. 783, 785, 787.

The decision in the above case is based upon the theory that the marginal note to the section is "summary trial in certain *other* cases." These words which constitute the marginal note to the original section 785 as passed in 1892 are construed as having reference to other "offences" rather than to other "contingencies" which, it is submitted, was more probably the meaning of the marginal note. Sec. 785 was originally applicable to Ontario only, while sec. 783 applied throughout Canada. The officials authorized to exercise authority under sec. 785 are of a more restricted class than those authorized to act under sec. 783, the word "magistrate" in the latter section having the special statutory meaning declared by sec. 782 and not being equivalent to police or stipendiary magistrate. The class of offences to which sec. 785 was to apply was stated in the section itself in these words:—"any offence for which he may be tried at a court of General Sessions of the Peace." Had it been intended to restrict the class of offences, is it not reasonable to suppose that Parliament would have here inserted the word "other" and made the section in terms apply to any *other* offence for which he may be tried at a Court of General Sessions?

Note—Continued.

Summary trial for theft—Cr. Code secs. 783, 785, 787.

But by the statute of 1900, 63-64 Vict. (Can.), c. 46, amending the Criminal Code an entirely new section, 785, was substituted for the original section as contained in the Code of 1892, and the substituted section is without any marginal note.

The substituted section contains two sub-sections not in the original section and one of these expressly declares that secs. 787 and 788 do not extend or apply to cases tried under this section (785). As both sec. 787 and 788 have application only to sec. 783, such a declaration would appear to be unnecessary unless sec. 785 is taken to include some at least of the offences which are mentioned in section 783. Under sec. 785 as amended, the police and stipendiary magistrate of cities and incorporated towns throughout Canada, "have now power to try offences with the assent of the accused for which he might be tried at a Court of General Sessions of the Peace; these offences are defined by sections 539 and 540." *R. v. Bowers* (No. 2) (1903), 6 Can. Cr. Cas. 264, *ante*, per Ritchie, J., of the Supreme Court of Nova Scotia.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MARTIN, J., PRESIDING AT THE NELSON ASSIZES.

THE KING v. HOLMES.

Indictment—Grand Jury—Failure to endorse name of every witness—Motion to quash—Code sec. 645 directory only—Remitting bill of indictment to grand jury to endorse names of additional witnesses heard—Cr. Code secs. 273, 645.

1. The omission to endorse upon the bill of indictment the names of witnesses summoned by the grand jury of its own motion, does not invalidate the indictment, but the Court may send for the grand jury and direct that the names of such additional witnesses be endorsed and initialled so that the accused may have notice upon whose testimony a true bill had been found.
2. The provision contained in section 645 of the Criminal Code requiring that the name of every witness examined or intended to be examined shall be endorsed upon the bill of indictment, is directory only and not imperative.

ARGUED: May 8, 1902.

DECIDED: May 8, 1902.

THE prisoner was indicted at the Nelson Assizes on the 8th of May, 1902, before MARTIN, J., for that she "unlawfully did

use on her own person an instrument, to wit, a catheter, with intent then and there thereby to procure a miscarriage." Among the witnesses who gave evidence before the Grand Jury were two who had been summoned by the Grand Jury of its own motion, and whose names were not indorsed on the bill of indictment. The Grand Jury returned a true bill.

W. A. Macdonald, K.C., and A. M. Johnson, for the prisoner, moved to quash the indictment. Only such persons whose names appear on the back of the indictment should be called before the Grand Jury: sections 644 and 645 of the Criminal Code; Arch. Crim. Ev., 22nd Ed., 89. The latter part of section 645 has been held to be merely directory: *Reg. v. Buchanan* (1898), 1 Can. Cr. Cas. 442; 12 Man. R. 190, at pp. 196 and 197, but the requirement that the names of the witnesses examined before the Grand Jury shall be on the indictment is mandatory and not merely directory: *O'Connell v. The Queen* (1844), 11 Cl. & F. 155; *The Queen v. Townsend* (1896), 3 Can. Cr. Cas. 29.

Further, no offence is charged by the indictment. The forms in Crankshaw and Taschereau shew that it is necessary to allege that the use of this instrument was intended to commit an abortion on herself. The indictment alleges the use of this instrument with intent to procure a miscarriage, without saying upon whom the miscarriage was attempted.

Hamilton, for the Crown:: As to the first objection, the cases cited lay it down that the whole of section 645 is merely directory and it is not divisible. "Shall" in that section is not imperative. The reasons applicable to the latter part of the section, as to the foreman initialling the names of the witnesses, are equally applicable to the part under discussion. In any event, if the Court thinks the names of these witnesses should be on the indictment, it is within its power to have the indictment amended, and the names placed thereon: section 629 of the Criminal Code; *O'Connell v. The Queen* (1844), 11 Cl. & F. 155 at pp. 193 and 197. As to the second objection, if this is upheld, the section itself is in-

valid. The section does not state that the miscarriage shall be upon the prisoner's self. If the indictment shews clearly the crime as laid down in the section, it is sufficient.

NELSON, B.C., May 8, 1902.

MARTIN, J.:—I overrule the second objection: it is answered by the latter part of section 273, which says, "with intent to procure miscarriage"; whose is immaterial.

Then as to the first objection. The reasons for requiring the foreman of the Grand Jury to initial the names of the witnesses are at least as important as those requiring the witnesses' names to go on the indictment. The language of Tindal, C.J., in *O'Connell's Case*, and the principles recognized in *Reg. v. Buchanan* and *The Queen v. Townsend*, are fully as applicable to the former part of this section as to the latter. See also *Ross v. B. C. Electric Railway Co.* (1900), 7 B.C. 394. The irregularity objected to does not seem to be an essential requirement, and I therefore rule that it is directory. But that so that the accused may have the full benefit of notice of all the witnesses who have appeared against her, I shall send for the Grand Jury, and direct the names of the two witnesses to be added to the list on the back of the indictment, and initialled, and the indictment will be re-presented to the Court.

Direction accordingly.

The Grand Jury were thereupon summoned into Court and the names of the two witnesses were added to the list of witnesses on the back of the indictment and initialled by the foreman.

Note: *Grand jury*—Initialing names of witnesses endorsed on bill of indictment—*Cr. Code* sec. 645.

Section 645 of the Criminal Code is as follows:—

The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him, and examined touching such bill of indictment.

Note—Continued.

*Grand jury—Initialing names of witnesses endorsed on bill of indictment—
Cr. Code sec. 645.*

Then section 7 of the Interpretation Act, R.S.C. 1886, c. 1, enacts that "In every Act of the Parliament of Canada, unless the context otherwise requires.....the expression "shall" shall be construed as imperative. (Sub-sec. 4).

The provision requiring the foreman of the grand jury to initial upon the bill of indictment the names of witnesses sworn has in two Canadian cases been held to be directory only and not imperative, and the court in both cases refused to quash the indictment because of the omission of the foreman in that respect. *R. v. Buchanan* (1898), 1 Can Cr. Cas. 442, 112 Man R. 190; *R. v. Townsend* (1896), 3 Can. Cr. Cas. 29, 28 N.S.R. 468.

In the latter case Meagher, J., said:—

"The Interpretation Act provides that the word "shall" shall be read as imperative; but I do not see that this should be regarded as making that word imperative where, as here, the context shows it was intended to be directory only."

The opposite view is taken in the recent case of *The King v. Belanger*, 6 Can. Cr. Cas. 295, by the full Court of King's Bench at Montreal, it being there held that the failure to initial the names of the witnesses examined before the grand jury is a good ground for quashing the indictment.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WURTELE, J.

THE KING v. WENER.

Option for speedy trial—In what cases it can be exercised—Bill of indictment preferred to the grand jury charging additional parties to those committed—When accused must elect for speedy trial—Adding or substituting another charge—Crim. Code secs. 765, 767, 773, 775.

1. In order to waive a trial by jury and to elect to be tried by a Judge of Sessions, an information must have been laid before a Justice of the Peace and a preliminary enquiry had thereon and the accused must have been committed for trial.
2. If an accused party neglects to take the necessary steps to elect in favor of a "speedy trial" without a jury in the special Court for speedy trials, before he has pleaded to an indictment preferred by leave of the judge of a jury Court his plea to such indictment will conclude him from electing against a jury trial.
3. The charge which may be added or substituted with the Judge's consent at a "speedy trial" under Code section 773, must be cognate to the one for which the accused was committed or bailed, and it is not permissible to add or substitute a charge wholly disconnected therewith.

DECIDED: March 24, 1903.

THE accused Wener, Hart, Webber and Komienksy were committed for trial for conspiracy to defraud after a preliminary investigation, but no bill of indictment was preferred to the Grand Jury on such charge. A bill of indictment, however, was preferred by the Crown counsel with the consent of the Judge presiding in the Court of King's Bench charging the four accused and two additional parties with conspiracy. Two further bills were preferred against the six parties, charging them with having committed other indictable offences, and the Grand Jury declared the three bills well founded and returned them into Court as true bills.

The accused severally pleaded not guilty on the three indictments on arraignment, but when the Court proceeded to fix a day

for the trials, they moved that an order be made allowing them to be taken before a Judge of Sessions to declare their option for speedy trial on the indictments.

MONTREAL, March 24, 1903.

WURTELE, J.:—On the 24th January last, an information was laid before His Honor Judge Desnoyers, one of the Judges of the Sessions of the Peace, in the District of Montreal, against Harris Wener, Samuel Hart, Abraham Webber and David Komienksy, charging them with having conspired together on the 29th of December last at the City of Montreal, to defraud the creditors of the last named. After a preliminary inquiry the Judge of Sessions held that the evidence adduced was sufficient to put them on their trial, and admitted them to bail to appear at the present term of the Court of King's Bench, to plead to such indictment as might be found against them by the Grand Jury with respect to the charge which had been laid against them.

No bill of indictment was preferred to the Grand Jury on that charge, but a bill of indictment was preferred to the Grand Jury, by the counsel acting on behalf of the Crown, with the written consent of the Judge presiding, charging the four persons just named, and also H. Seidman and William Webber, with having conspired together on the 29th of December last to defraud the creditors of David Komienksy. Another bill of indictment was preferred against the same six persons charging them with having conspired together to commit another indictable offence, which was that David Komienksy should dispose of his property to N. Seidman and William Webber, and that the proceeds of such fraudulent disposal should be paid to Harris Wener, Samuel Hart and Abraham Webber, with intent to defraud his creditors. A third bill of indictment was also preferred against the same persons, except William Webber, charging them with having conspired on the 27th December last to obstruct, prevent and defeat the course of justice in a cause of *The King v. David Komienksy*, then pending on an information

laid by Elzear L. Rosenthal before Ulric Lafontaine, Esq., a Justice of the Peace for the District of Montreal. The Grand Jury found the three bills of indictment well founded, and on the 2nd of March instant, returned them into Court as true bills, and the indictments were then filed of record.

The defendants at the opening of the sitting of the Court on the 4th March instant, without raising any objection, severally pleaded not guilty on the three indictments, but when the Court was proceeding to fix a day for the trials, they collectively moved that no date should be fixed for the trials in this Court of the charges contained in such three indictments, but that an entry on the record should be made to the effect that on that day they had, while in custody, awaiting trial on the indictments, made a declaration before His Honor Judge Choquet, one of the Judges of the Sessions of the Peace in the District of Montreal, for trials under the part of the Criminal Code relating to speedy trials.

It appears that from the day on which the defendants, who had been charged with conspiracy to defraud before His Honor Judge Desnoyers, had been admitted to bail to appear before this Court to be tried for that offence, to the day on which the indictments against them and the others who have been named were found and were filed of record, no step was taken by them to be tried before one of the Judges of Sessions without a jury, on the charge laid against them before the Judge of Sessions; that two days after the indictments had been found and returned into Court, in the morning of the 4th March instant, the defendants surrendered themselves into the custody of the sheriff to await trial on such indictments and were brought by the sheriff before His Honor Judge Choquet; and that they then declared, through their counsel, that they had been indicted under three different charges, and that they wanted a trial under the provisions of the Criminal Code, respecting speedy trials; and it appears further that they appeared again in the afternoon and that the three indictments were produced and exhibited to the Judge of Sessions and were read to the defendants, and that they again declared

that they wanted a trial without a jury on the charges contained in them.

A question was raised whether persons indicted without any preliminary inquiry having been made and without having been committed for trial by a Justice of the Peace, had an absolute right to be tried under the provisions of the Criminal Code relating to speedy trials. The Judge of Sessions rendered no decision on this point of law, but declared that he would await the judgment which might be rendered on it by the Court of King's Bench, and that he would abide by the decision of the Court; and he did not, therefore, proceed to prefer the charges and arraign the defendants upon them.

The question which is now before the Court upon the motions made by the defendants is, in effect, whether under the circumstances of the three cases, the defendants have the right to elect to be tried before a Judge of Sessions holding a Court of Record for the speedy trial of indictable offences which fall within the jurisdiction of Courts of General or Quarter Sessions of the Peace, without a jury, and not before the Court of King's Bench with a jury.

Trial by jury for criminal offences which are indictable is the ordinary way in which prosecutions are conducted, and it is also a privilege and a right which belong to every subject within the British realm, but while an accused cannot be deprived of this privilege and of this right in an arbitrary manner, either by the Crown or by a Court, he may, when there is a statutory provision to that effect, waive his common law and constitutional privilege and right if he chooses. When, however, the cases in which, and the conditions under which a waiver of a trial by jury may be made and the mode of waiver are prescribed by the statute, its provisions are restrictive and a trial by jury can only be waived in the way which has been decreed, and the waiver of a right to a trial by jury can only be made in the cases, under the conditions and in the phases of a case which are specified in the statute.

To decide the question of law raised in the cases now under consideration, we only have to examine Part LIV. of the Crim-

inal Code to see in what cases, under what conditions, and in what phases of a case an accused has the right to elect to be tried without a jury and to take a speedy trial.

Section 765 provides that every person committed to jail for trial on a charge for any offence triable before the General or Quarter Sessions of the Peace may, with his own consent, of which consent an entry must be made of record, be tried in the Province of Quebec before a Judge of Sessions without the intervention of a jury, whether the Court to which he has been committed or the Grand Jury of such Court is or is not then in session; and that when a person has been admitted to bail to ensure his appearance for trial and has been surrendered by his sureties, or has rendered himself into custody, and awaits trial on such a charge, he is deemed to have been committed for trial. By section 766 the sheriff is required to notify in the District of Montreal one of the Judges of Sessions that a person has been committed to jail for trial, and to state his name and the nature of the charge preferred against him, and then the Judge should cause the prisoner to be brought before him. By section 767 the Judge is required to obtain the depositions on which the prisoner has been committed, then to state to him the charge made against him, and to inform him that he has the option to be forthwith tried before one of the Judges of Sessions without a jury, or to remain in custody, or be admitted to bail, and be tried in the ordinary way by the Court having criminal jurisdiction, to which he has been committed; if the prisoner consents to be tried by the Judge without a jury, the charge for which he has been committed for trial is preferred against him, and the trial proceeds before the Judge, who then not only decides all questions of law, but is also the trier of the facts; and when a prisoner has elected to be tried by jury, he may at any time before his trial has commenced, and whether an indictment has been preferred against him or not, re-elect, but in this case the prisoner's right to a trial without a jury, or a speedy trial, is not absolute, and it is within the discretion of the Judge of Sessions not to allow such second election.

Now what is the result of these statutory provisions? It is clear that in order to waive a trial by jury and to elect to be tried by a Judge of Sessions under the statutory provisions for speedy trials, an information must have been laid before a Justice of the Peace, a preliminary enquiry must have been made, and depositions giving evidence concerning the offence charged must have been taken, and finally the accused must have been committed by the Justice of the Peace for trial, or be in custody on the charge when bail has been accepted for his appearance for trial, either by reason of having been surrendered by his sureties, or of having rendered himself, or otherwise, awaiting trial on such charge. The only cases in which, by the Criminal Code, which is a statutory provision, the accused parties are allowed to ask for a speedy trial are those in which an information has been laid before a Justice of the Peace charging the accused with the commission of an indictable offence triable in the General or Quarter Sessions of the Peace, in which a preliminary enquiry has been made, and depositions have been taken, and in which the accused parties have been committed to jail for trial by the Justice of the Peace, or have been admitted by him to bail for trial, and are subsequently placed in custody awaiting trial for the offence charged against them. The charge in the Court for Speedy Trials must therefore be that for which the accused has been committed or bailed by a Justice of the Peace.

Section 773 states that the Clerk of the Peace, or other prosecuting officer, may, with the consent of the Judge, prefer against the prisoner a charge for any offence for which he can be tried under the provisions of the Criminal Code respecting speedy trials, other than the charge for which he has been committed to jail for trial, although such charge does not appear and is not mentioned in the depositions upon which he has been committed; but in order to have the right to prefer such other charge the prisoner must have been committed or admitted to bail and subsequently placed and held in custody, on the charge of having committed an indictable offence for which he had the right to demand a speedy trial without a jury, he must have been brought

and must be legally before the Judge of Sessions, he must have consented to waive his right to a trial by jury and have consented to take a speedy trial without one. The object and the intention of this provision are not to allow another charge to be made for an offence of another nature to the one for which the prisoner was committed or bailed for trial, but to permit during the course of a speedy trial the prosecuting officer to prefer the same charge in another form, to substitute a charge for an attempt to commit an offence when the charge is for the complete commission of the offence, or to substitute a charge for the commission of an offence which is a lesser one than the offence for which the prisoner was committed for trial, but which is included in its commission, even though it should not be stated as described in the depositions. The other charge must not be a totally distinct charge, nor be wholly disconnected with the charge for which the commitment or the admission to bail for trial was made. In one word the other charge must be cognate to the one for which the prisoner was committed or bailed. When the charge has been drawn without sufficient accuracy, a proper and appropriate charge may be substituted and preferred. This gives a reasonable application to the provisions contained in section 773, which must preclude any other interpretation. *Regina v. Lonar*, 25 N.S.R. 124; *Regina v. Smith*, 25 N.S.R. 138; and *Regina v. Morgan*, 2 B.C.R. 329. The prisoner need not necessarily be tried for an offence in the language of the commitment or of the recognizance, but he may be tried on any form of charge in which the offence can properly be described, although not so mentioned in the depositions, which do not always describe the offence accurately and fully. As stated by Mr. Justice Wilson, it was never intended that if the prisoner were committed for larceny, he could be tried for manslaughter, nor if he were in for arson that he could be tried for burglary, but on the other hand, if he were committed or bailed for trial for stealing the goods of A., it was never intended that the same goods in another count should not be described as the goods of B., nor if he were committed or bailed on a charge of wounding with

intent to maim, that he should not be tried for the same wounding with intent to do some grievous bodily harm. The crime may be described differently, but it must be for the same or a cognate offence. *Cornwall v. Reg.*, 33 U.C.Q.B.R. 119, and *Regina v. Smith*, 3 Can. Cr. Cas. 467.

If no election has been made before an indictment is returned founded on the facts or evidence disclosed by the depositions taken at the preliminary enquiry, the accused has no statutory right to demand a trial before a Judge of Sessions without a jury, and avoid a trial on the indictment, but if an accused has elected for a speedy trial before a bill of indictment has been preferred, he cannot be deprived of that right, because a bill of indictment has subsequently been preferred and found by the Grand Jury; in such a case, the indictment so found and returned would have to be quashed. *The Queen v. Burke*, 24 O.R. 64.

The Criminal Code does not prescribe that an accused can elect to be tried without a jury when, without a preliminary enquiry or without a committal or an admission to bail, and subsequent custody for trial, a bill of indictment has been preferred by the Attorney-General or by any one by his direction, or with the written consent of a Judge of a Court of criminal jurisdiction, or by order of such Court, and thus remove the prosecution from the forum to which it properly belongs to another to which jurisdiction has not in such case been given by law. In the absence of any statutory provisions or statutory authority an accused has no right in such a case to demand and obtain a trial in any other Court than the one in which the indictment was found, and which has jurisdiction over the case, and is seized with it.

The three indictments against the defendants were preferred with the written consent of a Judge of the Court of King's Bench without any preliminary proceedings, and consequently the defendants have no right to demand a trial before a Judge of Sessions or a speedy trial, and to remove the indictments and the cases from this Court; under the law. this Court has full juris-

diction, while the special Court for Speedy Trials, under the circumstances, has none. Section 767 enacts that when a prisoner committed for trial for an offence, or who is deemed to have been so committed under the provisions of sec. 765, has been brought before the Judge of Session, such Judge shall obtain the depositions on which the prisoner was so committed or bailed, and subsequently placed in custody, and shall state to him that he is charged with the offence and describe it. It is clear that the offence referred to is the offence mentioned in the depositions, and that it is from them the Judge must ascertain what is the offence with which the prisoner is charged, and for which he has been committed or bailed, and the result is that where there are no depositions the accused has no right to elect for a speedy trial before a Judge of Sessions without a jury. *The Queen v. Gibson*, 3 Can. Cr. Cas. 451.

With respect to the indictment for the conspiracy to defraud, four of the defendants were arrested on an information laid before His Honor Judge Desnoyers, and a preliminary enquiry was made, but the four accused just referred to did not ask for a speedy trial until after the indictment was found against them and two additional conspirators and filed of record, and then not on the charge laid in the information, but on the charge contained in the indictment.

The accusation contained in the indictment to defraud is a different accusation to the accusation charged in the information; the information charged the defendants, Harris Wener, Samuel Hart, David Komienksy and Abraham Webber alone, and not with others, either known and named, or unknown, with conspiracy to defraud, while the indictment charges them and two others, H. Seidman and William Webber, with having all six conspired together to defraud. Each accusation or charge is specific and definite, and each is distinct and different from the other. In one case four persons, without others, known or unknown, are charged with conspiracy, and in the other six persons who are all named are charged with conspiracy. The indictment, therefore, contains a different accusation or charge to that con-

tained in the information, and the bill of indictment was preferred to the Grand Jury without any preliminary enquiry, by which H. Seidman and William Webber were implicated, and with the written consent of a Judge of this Court. None of the defendants have any right, under the circumstances, to ask for a speedy trial, and for the removal of the indictment from this Court to the Special Court for Speedy Trials.

And, moreover, whenever an accused neglects to take the necessary steps to elect for a trial without a jury before the Special Court for Speedy Trials before an indictment is found against him and returned into Court, and is filed of record, his plea to such indictment will conclude against him as to the mode of trial and he cannot afterwards elect for a speedy trial without a jury. *The Queen v. Lawrence*, 1 Can. Cr. Cas. 295. His plea to the indictment conclusively and exclusively fixes the forum.

The three motions made by the defendants are unfounded, and are consequently dismissed. It is ordered that a day be now fixed for their trial upon the three indictments found against them.

Motions dismissed.

J. P. Cooke, K.C., and S. W. Jacobs, for the prosecution.

R. A. E. Greenshields, K.C., Jas. Crankshaw and H. A. Hutchins, for the defence.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., IN COURT.

RE SARAH SMITH'S BAIL.

Recognizance to keep the peace—When and by whom two years' term may be required—Stipendiary exercising "summary trial" powers must shew jurisdiction on face of recognizance—Application of Code Form XXX.—Estreat of recognizance refused—Crim. Code, secs. 958, 959.

1. A recognizance to keep the peace for two years, being beyond the powers conferred upon justices by Code section 959 and only authorized to be taken by a stipendiary magistrate under certain circumstances and when exercising a power of "summary trial," must shew on its face that the magistrate had jurisdiction to require it to be given, or its estreat will be refused.
2. Where a stipendiary magistrate taking a recognizance to keep the peace follows form XXX. of the Code without reference therein to any pending prosecution or to any obligation to appear in court, it is to be assumed that he was proceeding in his capacity of a justice of the peace under Code section 959, to which alone that form is applicable, and if the term exceeds twelve months the recognizance is void.

ARGUED: April 24 and May 1, 1903.

DECIDED: May 1, 1903.

Motion on notice given by the Attorney-General of Nova Scotia under Crown Rules 84 and 86 to the principal and her sureties at the March session, 1903, of the Supreme Court at Halifax sitting for the disposal of criminal business, to put upon the estreat roll a recognizance to keep the peace and be of good behaviour, etc. Subsequent to the acknowledgment by the cognizors of the said recognizance the principal was convicted at Halifax for violation of a city ordinance for openly using obscene language, and again for an offence under section 207(f) of the Criminal Code, 1892.

The recognizance, after the breaches thereof, was transmitted by the Stipendiary Magistrate taking the same to the Prothonotary and Clerk of the Crown at Halifax, and was as follows:—

CANADA.

Province of Nova Scotia;

City of Halifax.

"Be it remembered that on the 17th day of November in the year of our Lord one thousand, nine hundred and two, personally came and appeared before the undersigned Stipendiary Magistrate in and for the city of Halifax, Sarah Smith, of the said city, widow, Daniel Downey, of Preston, county of Halifax, yeoman, and James Lee, of Preston, aforesaid, yeoman, and severally acknowledged themselves to be bound and owe to our Sovereign Lord the King, viz:—The said Sarah Smith in the sum of two hundred dollars and the said Daniel Downey and James Lee each in the sum of one hundred dollars to be levied on their several and respective goods and chattels, lands and tenements, if default shall be made in the condition hereunder written.

"The condition of the above written recognizance is such that, if the above bounden Sarah Smith shall keep the peace and be of good behaviour towards all His Majesty's subjects, but more particularly towards Louis Lovett for two years from the date first above written, then this recognizance to be void, or else to remain in full force."

Taken and acknowledged the date Sgd. SARAH SMITH (L.S.)
aforesaid before me, being first read Sgd. DANIEL DOWNEY (L.S.)
over and explained.

S ^r GEORGE H. FIELDING,	his
Stipendiary Magistrate in and for	Sgd. JAMES X LEE (L.S.)
the city of Halifax.	mark.

¹
HALIFAX, N.S., April 24 and May 1, 1903.

Andrew Cluney, for the Attorney-General of Nova Scotia.
John J. Power, for the principal and her sureties.

HALIFAX, N.S., May 1, 1903.

WEATHERBE, J., gave an oral judgment at the conclusion of the argument holding, that the Stipendiary Magistrate of the
27—c.c.c.—'03.

city of Halifax had, in proper cases, jurisdiction to order persons tried before him to give a recognizance to keep the peace, etc., (1) under section 958 of the Code for any term not exceeding two years when sitting under Part LV. for "The Summary Trial of Indictable Offences," or (2) under section 959 of the Code for any term not exceeding twelve months when making a summary conviction under Part LVIII., or (3) as a conservator of the peace, for the same term when acting under section 959 (2), etc., the Stipendiary Magistrate in the last two cases being a "justice" within section 839(a) of the Criminal Code; that to sustain this recognizance under the first named section 958, as no form was prescribed by the Code, it should, following *Bridge v. Ford*, 4 Mass. 642-3, per Parsons, C.J., have shewn on its face by recital or otherwise that the Magistrate was proceeding under it; that in this case the Magistrate followed the Form XXX. of the Code, and it must, therefore, be assumed that he was proceeding not under section 958, but under section 959 of the Code, which, only, authorizes the form used; and, as the security required was for a period of two years, such an order was in excess of the powers conferred on the Stipendiary Magistrate by section 959 of the Code, and a recognizance founded on such an order was null and void and an application to estreat the same should be refused.

Motion dismissed.

Note: *When recognizances should shew jurisdiction.*

This decision appears to be correct.

In *Bridge v. Ford*, 4 Mass. 642-3, Parsons, C.J., said:—

"It does not appear from any part of the record of which the recognizance is now a part, that the justice had any jurisdiction in the cause referred to. We cannot conjecture in what manner the process was instituted or what was the cause of it or whether it was a cause within the jurisdiction of a justice of the peace. And we cannot presume anything in favor of the jurisdiction of an inferior magistrate, and it is not general but given and limited by particular statutes. In the condition of the recognizance the justice ought to have recited so much of the cause that it might appear he had legal cognizance of it. If

Note—Continued.

When recognizances should shew jurisdiction.

it were not within his jurisdiction the proceedings as well as the recognizance were void."

So it is held, as to a recognizance to answer a criminal charge, that it should state in substance all the proceedings, which show the authority of the Court or magistrate to take it. *State v. Smith*, 2 Greenl. R. 62; *Com. v. Daggett*, 16 Mass. R. 447; *Com. v. Downing*, 9 Mass. 520.

Statutory forms may displace this common law rule by omitting such recitals, but only as regards the cases to which they are declared by the statute to be applicable.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, LANDRY, BARKER, McLEOD AND GREGORY, JJ.

THE KING v. ROGERS.

Place of trial—Indictable offence—Witness in same country too ill to attend—Removal of Court and jury to his residence to take his evidence—Consent of counsel in matter not affecting the Court's jurisdiction—Crim. Code secs. 246, 673, 677, 681, 687.

1. At the trial of an indictable offence, the presiding judge may with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom, and may order that the Court and jury proceed there for that purpose.
2. The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the Court.

ARGUED: November 4, 1902.

DECIDED: November 4, 1902.

The prisoner, having been indicted for administering poison to her husband with the intent to do grievous bodily harm, was tried before Mr. Justice Hanington at the Victoria circuit in September, 1901, and convicted. After she had pleaded to the indictment and the trial had begun at the Court House at Ando-

ver, it appeared that the prisoner's husband was so ill that he was unable to leave his house, and the presiding Judge thereupon, with the consent of the counsel both for the Crown and the prisoner, ordered that the Court and jury should proceed to the house where the husband lay, which was in the shiretown, about four miles from the court house, in order that his evidence might be taken.

FREDERICTON, November 4, 1902.

Thomas Lawson now applied for leave to appeal pursuant to the provisions of the Act 63-64 Vict., ch. 46, amending section 744 of the Criminal Code, on the grounds that the learned Judge had no power to remove the jury from the court house in order to take the evidence of the husband, Tom Rogers, and that his evidence should have been taken by commission. Section 681 of the Code provides the only means for taking the evidence of a person not present in Court. I refer also to sections 673 and 687 of the Code; Con. Stat. ch 32, sec. 4; 61 Vict., ch. 34, sec. 121; 2 Bac. Abr. 474. *Attorney General of New South Wales v. Bertrand*, L.R. 1 P.C. 520, shews that the consent of the prisoner or his counsel is not sufficient to confer jurisdiction.

FREDERICTON, N.B., November 4, 1902.

TUCK, C.J.:—I think that there is nothing in the points taken, and that leave to appeal should be refused.

HANINGTON, J.:—I had no doubt at the time, and have none now, but that I had the power to order the adjournment of the Court to any place within the county. Besides, as the case shews, I took the precaution to obtain the consent of the prisoner's counsel to what was done, and as this is a matter not going to the jurisdiction of the Court, the prisoner is bound by that.

LANDRY, J., agreed that the application should be refused.

BARKER, J.:—This trial was properly commenced when the learned Judge thought that it was in the interest of the administration of justice to adjourn the Court to another place. I think that he had the right to do it. The citation from Bacon's Abridgement has no application.

MCLEOD, J.:—I can not quite assent to the proposition that the Judge had the right to take the Court and jury to any place he might think fit, even though it should be within the county. In a case of this kind it was the intention of Parliament that a commission should issue or that the depositions be read. However, as all parties assented to the course adopted, I think that the motion should be refused.

GREGORY, J.:—I agree that there is nothing in the motion; but I can not agree that a Judge can hold his Court anywhere within the county, unless some necessity arises. In this case the prisoner's counsel consented, and that is sufficient.

Leave to appeal refused.

Note: Consent of prisoner or of his counsel in indictable offences.

Admissions are commonly made in civil cases by a party or his solicitor for the purpose of dispensing with proof at the trial. Such admissions may be made

- (a) by the pleadings;
- (b) by answer to a notice to admit, or
- (c) by agreement or otherwise.

On arraignment of a prisoner upon a criminal charge he is asked

"How say you, are you guilty or not guilty?"

If the prisoner thereupon answers "guilty" and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed or he is removed from the bar to be again brought up for judgment. Archbald's Crim. Plead., 20th ed., 159. A plea of guilty only admits the offence charged in the indictment and not the truth of the depositions. *R. v. Riley*, 18 Cox C.C. 286.

Even the prisoner's consent will not confer jurisdiction and he may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal he has himself selected. *R. v. Smith* (1898), 3 Can. Cr. Cas. 467 (N.S.).

*Note—Continued.**Consent of prisoner or of his counsel in indictable offences.*

Admissions for the purpose of dispensing with proof were formerly not allowed in cases of felony, except by a plea of guilty. Phipson Evid., 2nd ed., 16. The same rule was sometimes applied to cases of misdemeanour. *R. v. Thornhill*, 8 C. & P. 575.

Now, by sec. 690 of the Criminal Code 1892, "any accused person on his trial for any indictable offence or his counsel or solicitor may admit any fact alleged against the accused so as to dispense with proof thereof." This does not, however, enable a valid consent to be given to something which is manifestly irregular, as that the witnesses should be examined without being sworn, or that admissions made by the prisoner's solicitor to the opposing solicitor out of Court should be received as evidence. *Whelan v. Regina*, 28 U.C.Q.B. 2, 52; *Richardson v. Peto*, 1 M. & G. 896. In order to make a party responsible in a criminal case for his solicitor's letters, it must be shewn that the letters were written in pursuance of specific instructions from the client, and not merely in consequence of interviews with him, or general instructions from him. *R. v. Downer*, 14 Cox C.C. 486; *R. v. Joyce*, 119 Sess. Papers, C.C.C. 296.

Upon a new trial, everything must be begun *de novo*, and the prisoner asked to plead again. "There is no court continuing all the time before which he has pleaded; there must be a new court established for the trial of each charge, and the proceedings upon the first trial cannot be incorporated with those upon the second." Per Killam J. in *R. v. Riel* (No. 2), (1885), 1 Terr. L.R. at page 60.

In *Attorney-General v. Bertrand* (1867), L.R. 1 P.C. 520, the facts were that a prisoner had been tried in New South Wales for felony, after a previous trial and disagreement of the jury thereat. On the second trial some of the witnesses were re-sworn, and their evidence given at the first trial was read over to them from the judge's notes at the instance of the presiding judge, who informed each witness that he intended to read over the notes which he, the judge, had taken of the evidence given by the witness at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so. The judge also then informed the counsel for the prisoner and the counsel for the crown that if either of them wished to ask the witness any questions he could do so. No specific or definite consent was given by the prisoner or his counsel as to the proposed course being adopted, or as to any specific witness being thus examined, but no objection was then made by the prisoner or his counsel, and they were considered by the court to have assented to the course proposed. The Judicial Committee expressed the opinion that such a mode of laying the evidence before the jury was to be discouraged, although not amounting in law to a mis-trial.

Statements made in a party's presence in the course of judicial proceedings are not generally receivable against him upon the sole ground that he did not deny them, for the regularity of such proceedings prevents the

Note—Continued.*Consent of prisoner or of his counsel in indictable offences.*

free interposition allowed in ordinary conversation. *R. v. Turner*, 1 Moo. C.C. 347; *R. v. Mitchell*, 17 Cox. C.C. 503; *R. v. Coyle*, 7 Cox C.C. 74.

The accused person may legally consent to withdraw or release his challenge of a juror, or to accept a juror on his challenge being overruled. *Whelan v. Regina*, 28 U.C.Q.B. 2. So if the prisoner whose challenge of a juror for favour has been disallowed, chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favour. *Stewart v. The State* (1853), 13 Arkansas Rep. 720; approved in *Whelan v. The Queen*, 28 U.C.Q.B., at p. 55; *Freeman v. People* (1847), 4 Denio, N.Y., 61. He may consent to secondary evidence being given, or to withdraw a plea of not guilty and plead guilty. *Whelan v. Regina*, 28 U.C.Q.B. 2.

The general rule in civil cases where there is a jury is not to entertain a motion for a new trial upon a ground of misdirection or nondirection, unless the particular point in controversy was raised at the trial and pressed upon the consideration of the judge. The rule has been held in Ontario to be as much applicable to a criminal as a civil trial especially when the parties to the litigation are represented by counsel. *R. v. Fick* (1866), 16 U.C.C.P. 379; *R. v. Wilkinson* (1878), 42 U.C.Q.B. 492, 500; *R. v. Seddons*, 16 U.C.C.P. 389. But in the New Brunswick case of *R. v. Theriault* (1894), 2 Can. Cr. Cas. 444, 460, a manslaughter charge, the decision in *R. v. Fick* was disapproved. Harrington, J., there said:

"In such cases as the present the aim of the court as well as of the Crown should be to see that the prisoner has a full and complete trial and that a conviction is based on such points as reasonably arise upon the evidence; and it appears to me that if a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury, justice demands that such a conviction shall not stand."

An objection to an indictment for a formal defect must be taken before plea, and can only be taken afterwards by leave of the court or judge conducting the trial. Code sec. 629. The latter section, however, only applies where the defect is one which the court has the power to amend. *R. v. Mason*, 22 U.C.C.P. 246; *R. v. Bulmer*, 5 Montreal Legal News, 287; *R. v. Cameron* (1898), 2 Can. Cr. Cas., 173 (Que.). An indictment that does not set up in the statement of the charge all the essential ingredients of the offence is defective in a matter of substance and cannot be amended. *R. v. Cameron* (1898) 2 Can. Cr. Cas. 173, per Würtele, J.

[SUPREME COURT OF CANADA.]

BEFORE SIR ELZEAR TASCHEREAU, C.J., AND SEDGEWICK,
GIROUARD, DAVIES, MILLS AND ARMOUR, JJ.

DREW v. THE KING (No. 2).

Perjury—False oath made before de facto legal tribunal—Magistrate incompetent under special statute under which charge is laid—Cr. Code, sec. 145.

1. It is perjury under sec. 145 of the Criminal Code to give false testimony before a justice of the peace holding a judgment proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place.

Drew v. The King, 6 Can. Cr. Cas. 241 (Que.) affirmed.

ARGUED: March 2, 1903.

DECIDED: March 26, 1903.

Appeal from the judgment reported *ante* p. 241, of the Court of King's Bench (appeal side) for the province of Quebec, on a criminal case reserved affirming the conviction of the appellant for perjury, and the sentence pronounced against him upon such conviction in the Court of King's Bench, Crown side, for the District of Beauharnois.

The offence of perjury of which the appellant was convicted was committed upon the hearing of and information for trespass under article 5551 of the Revised Statutes of Quebec, upon lands situate in the County of Huntingdon, in the District of Beauharnois. The information was laid and the case heard and decided before the Recorder of Valleyfield, who was *ex officio* a Justice of the Peace in and for the whole of the District of Beauharnois, but did not reside in the county of Huntingdon, where the offence was charged to have been committed and was, therefore, without jurisdiction over the subject matter of the complaint in consequence of the provisions of article 5561 of the Revised Statutes of Quebec limiting the jurisdiction in such matters to one or more Justices of the Peace residing in the county in which the offence has been committed.

OTTAWA, March 2, 1903.

Wilson for the appellant.

Duncan McCormick, K.C., for the Crown.

OTTAWA, March 26, 1903.

The judgment of the majority of the court was delivered by

ARMOUR J.—The defendant charged one Benjamin J. Rowe before L. J. Papineau, the recorder of the town of Salaberry, of Valleyfield, with having entered upon his land without his permission contrary to the provision of article 5551 of the Revised Statutes of Quebec.

This charge was, by article 5561 of the said statutes, made cognizable before one or more justices of the peace, but such justices should only have jurisdiction when they resided in the county in which the offence had been committed.

The offence charged was committed in the County of Huntingdon, and the recorder, although *ex officio* a justice of the peace in and for the district of Beauharnois, in which district the County of Huntingdon was situate, did not reside in the County of Huntingdon, but in the County of Beauharnois.

The defendant was convicted of perjury committed by him upon the hearing of the said charge and the question is whether or not he was rightly convicted, the recorder not having jurisdiction over the offence charged.

And this question is determinable by determining whether or no the hearing of this charge by the recorder was a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, which provides that every proceeding is judicial within the meaning of that section which is held before any person acting as a court, justice or tribunal having power to hold such judicial proceeding whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding and although such proceeding was held in a wrong place or was otherwise invalid.

The recorder was a justice, but in hearing the said charge he was not a justice having power to hold such judicial proceeding, but he was acting as a justice having power to hold such judicial proceeding and his hearing the said charge was, therefore, a judicial proceeding within the meaning of that phrase as used in section 145 of the Criminal Code, and the defendant was rightly convicted.

The provision above quoted was taken from section 119 of the draft code prepared by the Royal Commissioners appointed to consider the law relating to indictable offences, and with respect to such section the commissioners said, in their report, that

in framing section 119 we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can show some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves.

And the recorder was, in hearing the said charge, a tribunal *de facto* exercising judicial functions.

SEDGWICK, GIROUARD and DAVIES, JJ., concurred in the judgment dismissing the appeal for the reasons given by Armour, J.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the Court of King's Bench at Montreal reported in Volume 11, at page 477 of the *Rapports Judiciaires de Québec*. I would allow it and quash the conviction in question for the reasons given by Wurtèle and Blanchet, JJ., *loc. cit.*, which to my mind are irrefutable.

It could not but be conceded, as it has been unanimously by the judges in the court *à quo*, and by the respondent (private prosecutor) at bar, that the recorder had no jurisdiction over the case wherein the appellant is alleged to have committed per-

jury. Secs. 24 and 26 of the Quebec Interpretation Act, declaratory of the common law, enact that:—

“When anything is ordered to be done by or before a judge, magistrate, functionary or public officer, one is understood whose powers or jurisdiction extend to the place where such thing is to be done; and

Whenever an oath is ordered to be taken or received, such oath is received by any judge or magistrate authorized to that effect having jurisdiction in the place where the oath is taken.”

Then art. 5561 of the Revised Statutes expressly deprives the recorder of any jurisdiction in the case in question.

The proceedings before him were not judicial proceedings, because he was not a judge or magistrate, *quoad* the case. He was not, it is admitted, a magistrate *de jure*. Neither could he have been at Valleyfield, not being a resident of the County of Huntingdon, a magistrate *de facto*, any more than if he had been sitting at Toronto or Vancouver. A *de facto* officer's jurisdiction cannot be territorially more extensive than the *de jure* one whose functions he assumes. Where the statute expressly enacts that only the magistrates residing in the county of Huntingdon have jurisdiction over the case, there cannot have been, outside of that county, whether in the same district or a thousand miles from it, a *de facto* magistrate having any reasonable pretence to jurisdiction. The respondent's contention that a magistrate *de facto* can exercise jurisdiction in any case at a place where the statute expressly decrees that there can be no magistrate *de jure* in that case is untenable. A magistrate *de facto* cannot have more powers than a magistrate *de jure*. The proceedings before the Recorder at Valleyfield were not only voidable, but were void of a nullity of *non esse*. As is said in the civil law, *defectus potestatis, nullitas nullitatum*. No plea of *autrefois acquit* or *autrefois convict* could be based on his decision. No appeal was necessary to set it aside; *Attorney-General v. Hotham*, Turn. & Russ. 209 at p. 219; and a writ of certiorari to have it quashed could have been granted though taken away by the statute (sec.

5579) if he had had jurisdiction. Had he committed any one for contempt for not answering his summons as a witness or for refusing to answer his questions, his warrant would not have been worth the paper it would have been written upon, besides rendering him liable in damages. Nay, under sec. 153 of the Code, he was perhaps guilty of an indictable offence for having illegally received the appellant's oath. There was, in law, no oath taken before him, for he had not the power in that case to receive any. And if there was no oath, no judicial oath, how can there have been perjury? The respondent's contention that section 145 of the Act bears the construction that there may be perjury where there is no judicial oath is irrational and untenable. Such an incongruity cannot have been intended by Parliament.

In fact that section, as I read it, plainly says that it is only when the false oath is received by a competent tribunal, or in other words by a person duly authorized to hold the judicial proceeding in which it is taken, that it is indictable for perjury. The words upon which the court below rely to hold the contrary are those of the last part of that section 145, which read as follows:—

“Or before any *person* acting as a court, justice or tribunal, *having power to hold such judicial proceeding*, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.”

Now, if the words “having power to hold such judicial proceedings” are read immediately after the word “person,” as by the punctuation they must be, they qualify the rest of the section and the oath must have been received, in any case, by one having the power to hold the judicial proceeding. And that they must be so read is rendered free from doubt by referring to the French version, which is the law just as much as the English

version, though not brought to the attention of the court below nor of this court.

That reads as follows:—

“Ou devant une *personne* agissant comme cour, juge ou tribunal, *autorisée* à faire cette procédure judiciaire, qu’il soit légalement constitué ou non, et que la procédure ait été régulièrement instituée ou non devant cette cour ou *personne* de manière à l’autoriser à faire la procédure, et lors même que la procédure aurait eu lieu dans une localité où elle n’aurait pas dû avoir lieu, ou qu’elle fût invalide sous d’autres rapports.”

There is no ambiguity in these words. It is undoubtedly to an oath taken before any person having power to hold the judicial proceeding wherein that oath was taken that the rest of the section exclusively applies, and of two possible constructions in one of the versions, that one which reconciles the two must be followed. So that the words “*having power to hold such judicial proceeding*” in the English version must be read as applied to the word *person* therein, as the corresponding words in the French version unquestionably must be. Here, it is conceded, the Recorder had no more power to hold the judicial proceeding in question than a citizen of the United States or of China would have had, or than he, himself, would have had if he had held his court in New York or Peking.

It is, therefore, still the law that

“no oath whatsoever taken before persons * * who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them . . . can ever amount to perjury in the eye of the law, because they are of no manner of force, but are altogether idle.”

I Hawk. P. C. Bk. 1, ch. 69, sec. 4.

Section 145 of the Code must be restricted to voidable, not to void, proceedings, to judicial, not to extrajudicial oaths as this one was. And an oath administered at a place without his territorial jurisdiction by an officer authorized to administer oaths is absolutely void.

The court *a quo* in its formal judgment seems to rely upon the fact that the appellant's oath in question was taken before a tribunal of his own selection. I fail to see how that can affect the question of the Recorder's jurisdiction, and why the appellant could be convicted of perjury if any other witness in the case could not have been. For the appellant could not either impliedly or expressly confer upon that magistrate a jurisdiction which the statute exclusively vests in the magistrates of the County of Huntingdon. When it is the jurisdiction of the person that is deficient, a party who invokes the jurisdiction of a court is not thereafter as a general rule allowed to question it, but that is not so when the court has no jurisdiction over the subject matter, or has no lawful power to act by reason of the fact that, as in this case, such power is expressly withheld by the statute, which expressly decrees (sec. 5561 R.S.Q.) that no other magistrates than those residing in the county where the trespass was committed, have jurisdiction over it, thereby in unambiguous terms taking away from this recorder any jurisdiction that he might perhaps otherwise have had over the case.

MILLS, J. (dissenting).—My conclusions in this case are so entirely in accord with those of Mr. Justice Wurtéle in the court below, that I might have contented myself with concurring in his opinions, and in the reasoning by which he has supported them. I accept his views of the law applicable to this case, as he has expressed them; but, as I find that some of my brethren in this court concur in the judgment of the majority of the court below, I feel it my duty to state with some degree of fulness the opinions which I entertain upon the subject.

The principles of the common law in respect to perjury have long been well settled; but some of the decisions in relation to this offence lie very close to the border line which separates those cases which have been held to be wilful and corrupt perjury, from another class which may be punished as contempts of court, or as misdemeanors, but which cannot be reached under the law relating to perjury.

Some of the cases in which the parties accused have been convicted of false swearing have been sometimes questioned, because it was doubted whether the principles of the law of perjury were strictly applicable, because, when analyzed, some of the elements which go to make up the crime of perjury seemed to be wanting. There were, nevertheless, cases in which the parties had sworn falsely, and for which the presiding judge felt very strongly that the offender, in the interest of society, deserved punishment; and so a construction was given to the law, in order that the offender might be reached, which seemed to go beyond the principles which had been before accepted and acted upon, and its applicability to these cases was sometimes thought open to question. So, when it was proposed here to codify the Criminal Law, a section was inserted to embody the law of these cases, and to remove any doubt, if doubt previously existed, that they lay within the borders of the crime of perjury, and the law was made clear, where before it might have been regarded, by a thoughtful student of its principles, as doubtful, by including them within the definition. It only requires an examination of these cases, and the provisions of section 145 of the Code, to see that the framers of the section aimed at making the definition of perjury cover the whole ground embraced within the decisions of the courts upon the subject.

I think it is only necessary to consider the system of jurisprudence as the common law made it, and as those cases extended it, in order to obtain a clear view, and to form a right appreciation of the interpretation of section 145 of the Code. We have to consider, in this case, a question of perjury committed before a tribunal that had no right whatever to try the cause then before it; that had no more power to adjudicate upon the question of trespass where it was laid, than a judge of Quebec would have to try a cause in the Province of Ontario, and it would require a very clear declaration in the statute to satisfy me that it was the intention of the Parliament to clothe a self-constituted tribunal, that had no existence in law, with the dignity, and surround it with the protection, which attaches to the proceedings

of one properly created under the authority of the State, for the purpose of discharging important public duties. We have here a magistrate, acting as such, in one county, clothed by the law with the necessary power to act in such matters only in another county, and we have a witness before him in this illegal and void proceeding, which he had no right to institute, charged with perjury, and put upon his trial for that offence, and convicted, for testimony given before one who was wholly without judicial authority, sitting as a court which, in law, had no legal existence. All the importance, and all the protection, which it is the policy of the law to bestow on the proceedings of a judicial tribunal, clothed with legal authority, has, by the proceeding in this case, been extended to one that has neither in fact, nor in law, any jurisdiction.

Where a limited tribunal, whether that limitation is due to the fact that the power has been generally withheld, or whether it is due to the fact that it is sitting outside of the territorial limits of its jurisdiction, takes upon itself to exercise judicial functions which do not belong to it, its decision amounts to nothing, its proceedings are void, there can be no appeal from its judgment, and the false testimony given before it does not constitute the offence of perjury: *Attorney-Gen. v. Hotham*, Turn. & Russ. 209. Yet, in this case, it has been held that a false oath taken before one who assumed judicial functions which he did not possess, instead of being regarded as an absolutely void proceeding, is, nevertheless, valid so far as to subject the witness to punishment for perjury. Such a recognition is altogether at variance with the settled principles of the Criminal Law, for it gives to the proceedings of an illegal body the same degree of protection and dignity that it bestows upon a legal tribunal, engaged in the discharge of its public duties.

No appellate court could, in a civil action, recognize such a tribunal by entertaining an appeal from its judgment, and no more should any appellate tribunal recognize the proceedings had before a magistrate, sitting as a judge outside of his territorial jurisdiction, and having no authority in law to investi-

gate and decide the question in respect to which he has ignorantly usurped judicial authority: *United States v. Babcock*, 4 Bailey (S.C.) 595; *Rex v. Foster*, Russ McLean, 113; *Pegram v. Styron*, 1 M. & Ry. 459; *Reg. v. Ewington*, Car. & Mar. 319.

There are some cases of false swearing which the common law regards as perjury; there are some cases of false swearing which cannot be tried and punished as such. The distinction rests upon well settled principles of jurisprudence which, in this regard, embody the underlying principles of the system. What is, and what is not, perjury at common law can be easily traced, and clearly ascertained by its students. But at every step we observe the line of distinction between law and ethics. Law, as Lord Stowell has well observed, has embodied and adopted the principles of ethics to a limited extent; it travels with them only a certain distance, and stops there. You are not at liberty to go further and say the general speculation would support you in a further progress. It is upon this rule that the law has defined and limited the crime of perjury; and if we were to extend it, so as to go beyond the requirements of the State, we might convert a salutary provision into a means of vexatious prosecution. Care must be taken not to sacrifice restrictions, justified by experience, to what may be regarded as a commendable desire to restrain falsehood, outside of those matters that are being judicially investigated. Neither the courts of law nor the bar desire to break down the distinction recognized, between falsehood sworn to in the course of justice, in a case which is being legally investigated and tried, and falsehood in every other circumstance. The distinction is one made by the law and founded upon reason and experience, and which has given to the common law, to some extent, its symmetrical features, and makes it capable of being expounded on principles of right reason, which were said by its votaries to be the perfection of the law, and I am not prepared to so interpret an Act of Parliament as to mar those features, without any adequate reason.

The criminal law never undertook to embrace within its boundaries the whole field of human conduct and to punish every wrong which one person might do to another as a crime. A large number of offences have been left with each individual, within the limits of the law, to redress for himself. He may decline to deal with a cheat, or to have any intercourse with a man who has wronged him. The law does not undertake to regulate these matters, because each person has adequate means of punishing the wrongdoer without recourse to the law at all. And so there may be many moral offences which the law does not punish, because the best interests of society would not be advanced by meddling with them as public offences.

The courts have undertaken, by their decisions, to draw the line in respect of false swearing, and to determine what false oaths should be punished as perjury, and what kinds of false swearing should not fall within the limits of that offence.

Perjury (as defined by Hawkins), is a wilful false oath, by one who being lawfully required to depose to the truth in any proceeding in the course of justice, swears absolutely, in a matter of some consequence to the point in question, whether he is believed or not: 1 Hawk. P.C. 429.

Mr. Bishop, in his work on Criminal Law, defines perjury to be

“the wilful giving under oath, in a judicial proceeding, or course of justice, of false testimony material to the issue, or point of enquiry.” 2 Bishop, Criminal Law [8 ed.] sec. 1015.

We have to consider the tribunal before which an oath is taken; the question of materiality of the evidence to the issue; the testimony as being false; the intent of the witness and other matters. The common law required that the oath should be administered in some judicial proceeding, or course of justice, which must be taken in the way directed by the law, and before an officer who is legally authorized to administer it. I do not think that section 145 of our Code has made any alteration in the law of perjury in this particular. It is generally admitted

that where a statute sets out a form of oath required that the statute is directory, and will be sufficiently complied with when followed in substance; so that, if what is sworn to is not true, it will not exempt the person taking it from being convicted for perjury. But if the words of the statute are wholly disregarded, no perjury can be assigned, though the oath should be false. The first thing to be noted is, that the oath must be one required in the course of justice, or in some judicial proceeding, and must be taken substantially as directed by the law, before an officer authorized to administer it. If a party in a cause becomes a witness for himself, under circumstances in which his testimony is not by the law receivable, it has been held that he may, nevertheless, commit perjury, and this seems to be an extension of his responsibility beyond the limits which a strict adherence to the principle upon which perjury rests would warrant; and so, where one is not a legal and competent witness in a case, but is nevertheless admitted as a witness by the court, and testifies wilfully and corruptly to what is false, he commits perjury: *Chamberlain v. The People*, 23 N.Y. 85. In the United States courts, where the principles of the common law, in respect to crime, have been followed, it has been held that where one swears falsely as to his residence, in an application for naturalization, it is not perjury, because the Act of Congress expressly provides that the oath of the applicant shall, in no case, be allowed to prove his residence, and so his own testimony cannot, under the authority of the law, be a legal part of the proceeding: *Silver v. The State*, 17 Ohio 365.

The same principle prevails in the English decisions. In the case of the *Reg. v. Stone*, 22 Eng. L. & Eq. 593, it was held that where a Master in Chancery had no authority to administer oaths to witnesses before the Court of Admiralty, the conviction for perjury in an affidavit used in the Court of Admiralty, but sworn to before a Master in Chancery, could not be supported.

Pollock, C.B., said:—

“The conviction must be quashed. The affidavit upon which perjury is assigned is sworn before a Master Extra-

ordinary in Chancery, who has no authority by virtue of his commission to administer an oath before the Court of Admiralty, nor does the practice of the Court of Admiralty, in an action upon an affidavit so sworn, convey any authority."

And Parke, B., said:—

"The authority of a Master in Chancery has relation entirely to matters before the Court of Chancery. Although the Court of Chancery may have a certain jurisdiction over the Court of Admiralty, yet the latter court, acting as a Court of Admiralty, is independent of the Court of Chancery, and a Master Extraordinary is not a person having authority to administer oaths in the Admiralty Court. If a man knowing the practice of the court uses an affidavit sworn in this manner, knowing it to be false, he is guilty of contempt of court, but it is not perjury."

In the case of *The Queen v. Tyson*, 1 C.C.R. 107, the question of the materiality of the evidence came before the Court for Crown Cases Reserved. One Sullivan was tried for robbery. Tyson swore that Sullivan had lived in a certain house for the last two years, and that he had never been absent from it more than two nights during that time. The Warden at the House of Correction at Wandsworth was called as a witness in the case, and testified that the prisoner Sullivan was in the prison at Wandsworth during twelve months of the time that Tyson had sworn that he was elsewhere. Kelly, C.B., said:—

"The real question is whether these statements were *material*. We all agreed that they were, as they tended to render more probable the truth of the first allegation."

Bramwell, B., said:—

"The witness was asked his reason for remembering, and thereupon he proceeded to state those circumstances which made him competent to swear to the cardinal matter. One of these circumstances is untrue; why is that not perjury?"

Lush, J., said:—

“I was embarrassed at first; but now I am quite satisfied that the allegations on which the prisoner was convicted were calculated to make the jury give a readier credit to the substantial part of his evidence, and therefore became material.”

In this case the materiality of what is sworn to does not depend on its intrinsic importance in respect to the facts of the case, but upon the purpose for which it was sworn to: *Rex. v. Greep*, Holt, 535.

In the case of *The Queen v. Smith*, 1 C.C.R. 110, reported in the same volume as *The Queen v. Tyson*, 1 C.C.R. 107, the prisoner was convicted for perjury alleged to have been committed on the hearing of an information before two Justices of the Peace, on an application for an order of affiliation. The prisoner was tried before Cockburn, C.J., at the Leicester Assizes, for perjury, which was alleged to have been committed upon the hearing of an application for an order as stated. The information laid by the mother was duly proved; and it was shown that the putative father appeared before the justices, and evidence was given on both sides. The court held that the father having appeared, and not having made any objections to the summons, it was not necessary to refer to it, or give any evidence of its existence on the trial for perjury. It was proved that Mee appeared before the justices, and that upon the hearing of the information, the evidence, which was the subject matter of the indictment, was given by Smith, who was called as a witness by Mee; but the summons was not produced on the trial of Smith, nor was secondary evidence given of its contents, nor was it proved that such summons had been served on Mee. Kelly, C.B., delivered the judgment of the court. He said:—

“In this case, though there was no summons produced, the information was put in and proved, and it was shown that, upon the hearing of the information before the justices, evidence on both sides was given, and that the prisoner gave the evidence which was the subject matter of the

indictment for perjury. Was there any necessity to produce the summons? The original object of the summons was to bring Mee into court. He did appear and no objection was then made to the summons. There was no necessity at the trial for perjury to refer to it, and, therefore, it was unnecessary to give evidence of it."

In the same volume the case of *The Queen v. Fletcher*, 1. C.C.R. 320, is reported. Here Jane Beswick made a deposition upon oath, and the question was whether, in order to give the magistrate jurisdiction in the case, there should be a deposition in writing upon oath. The case had been tried at the Assizes in the County of Derby, before Cleasby, B. In the judgment of the Court of Crown Cases Reserved, Boville, C.J., said:—

"The objection now taken is that the summons was irregularly issued, because there was no sufficient deposition on oath before it was issued. It has been suggested that under the section in question (7 & 8 Vict. ch. 101, sec. 3), there must be a written statement on oath—in fact an affidavit—by the woman; but I think at any rate an oral statement, taken down in writing in the usual way in which depositions are taken, must be sufficient. Jervis' Act, being later in time, cannot apply here, but certainly more than that Act prescribes cannot be required. The second Act referred to (8 Vict. ch. 10, sec. 1), does not affect the case. That Act only says that proceedings according to the forms in schedule, or to the like tenor and effect, shall be valid and sufficient; it does not say that these forms must be used. Then, if all that the Act requires be that the magistrates shall make a record of the evidence orally given, the summons itself seems to me very like a writing to the same tenor and effect, with a form of deposition in the schedule of the second Act."

The Chief Justice, after referring to the case of *The Queen v. Berry*, Bell C.C. 46, goes on to say:—

"The case was therefore precisely the same as the present; and all the judges composing the court, except my

brother Martin, after taking time to consider, held that the conviction ought to be affirmed, on the ground that the defendant by appearing and not objecting, had waived any irregularity in the issue of the summons."

And Blackburn, J., said, after discussing certain features of the case:—

"If either of these things be omitted, it is an irregularity for which the magistrate or his clerk is blamable, but it does not oust the jurisdiction. I think if these things were left out altogether the proceeding on the summons would none the less be good. But however this may be, the irregularity may be and was waived by the defendant's appearing and not objecting."

In the case of *The Queen v. Johnson*, 2 C.C.R. 15, the perjury alleged was committed by false oaths taken before one Thomas Deane, who held an inquest as deputy coroner touching the death of one Owen O'Hanlon. By 6 & 7 Vict. ch. 83, sec. 1, it is made lawful for any coroner of any county, city, riding, liberty or division, and he is thereby directed, by writing under his own hand and seal, to nominate and appoint, from time to time, a fit and proper person, such appointment being subject to the approval of the Lord High Chancellor, Lord Keeper, or Lord Commissioners of the Great Seal, to act for him as his deputy in the holding of inquests; and all inquests taken and other acts performed by any such deputy coroner, under or by virtue of any such appointment, shall be deemed, and taken to all intents and purposes whatsoever to be, the acts and deeds of the coroner by whom such appointment was made. Provided also that no such deputy shall act for any such coroner as aforesaid, except it were through the illness of the said coroner, or during his absence from any lawful and reasonable cause. In this case it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Deane was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath, to prove affirmatively that there was a lawful and reasonable cause for the absence of

the coroner, and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury, and not for the judge. The counsel for the Crown argued that even if the facts proved were insufficient to show that there was lawful or reasonable cause, still, inasmuch as by section 2 of the same Act it is provided that the inquisitions are not to be quashed by reason of their having been taken by deputy, the oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and, therefore, one on which perjury could be legally assigned. The first question of law reserved for the opinion of the court was, whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If not the conviction would stand.

The second question reserved was whether it was for the judge or jury to decide the question of reasonable cause. If for the jury the conviction must be quashed, unless the first question was decided in the negative. If for the judge, then the third question reserved was, whether there was evidence upon which the learned judge might properly decide as he did. If so, the conviction would stand. If not it must be quashed, unless the first question was decided in the negative. The court were of opinion that the conviction should be affirmed. They held that it was clearly for the judge to determine the question of the existence of reasonable and lawful cause for the coroner's absence.

In *Caudle v. Seymour*, 1 Q.B. 889, a warrant issued by justices was held bad which did not show any information upon oath upon which it had been issued. Coleridge, J., said, during the argument:—

“A man has no right, because he is a magistrate, to order another to be taken for an offence over which he has jurisdiction without a charge regularly made.”

In the case of *Turner v. The Postmaster General*, 5 B. & S. 756, parties were apprehended and brought before a magistrate

charged with setting fire to the letters in the pillar box. On their appearance at the Petty Sessions to answer the charges after witnesses had been examined, they were at the application of a prosecutor, remanded on bail for a week. At the adjourned sessions the attorney for the prosecution stated that he should proceed against the appellants under the statute 24 & 25 Vict. ch. 97, sec. 52, and asked their attorneys whether they would plead guilty to such a charge, or whether further evidence should be offered and supported; they answered that he must go on and prove his case. He called witnesses, and when the case for the prosecution was closed, the appellants' counsel objected that no information on oath had been taken, as the statute required, and the appellants were not found committing the offence, and were not legally in custody, and therefore the justices had no jurisdiction to convict them for the offence then charged. The offence with which the appellants were first charged was a felony; the offence of which they were convicted was punishable on summary conviction. The court held that the want of information and summons was cured by the appearance of the appellants before the justices, and that they had waived the objection that they were not legally in custody on the charge under section 52, and, therefore, the justices had jurisdiction to convict them. But on both occasions of their appearance before the justices the facts alleged against them were the same, and though they were brought up to discharge their bail, other circumstances show that they appeared voluntarily on this charge; the magistrates were, therefore, justified in convicting them on the charge which had been so made and heard. Cockburn, C.J., said:—

“All that they could have asked for was, that in point of strict form the evidence should have been taken again on the first charge, and that evidence in support of that charge only should be received. Practically, that was done. They were irregularly brought before the magistrate. In strictness, they were entitled to insist that there should be information and summons, but they waived that, and cross-examined the witnesses and exercised all their rights as de-

fendants on the first charge; after that, they cannot object that the justice had no jurisdiction to convict them summarily."

In the cases where there has been a waiver of some *irregularity* in the mode of summoning which was used (it is perhaps hardly correct to use the expression waiver), a justice can only proceed lawfully where he has jurisdiction, and the jurisdiction may be given by the appearance of the party, before the judge, to answer the charge. The jurisdiction may not depend upon the warrant; this may be improperly issued, but if the accused party appears before the magistrate without objection, he can hardly after a regular inquiry, and after an order for his commitment, take objection to the fact by complaining that he has not been brought regularly before the justices. In the case of *The Queen v. Hughes*, 4 Q.B.D. 614, the charge was made orally that Hughes had sworn falsely and corruptly. The warrant is not the charge, it is a means of procuring the attendance of Hughes to answer it. And the want of an information on summons might be cured by the appearance of Hughes. It is the duty of the magistrate to take all charges, of whatsoever nature, kind or connection they may be, in writing, and this, Lord Mansfield says, is an indispensable duty.

In the case of *The Queen v. Hughes*, 4. Q.B.D. 614, Lopes, J., thought the warrant was a mere process for bringing the party complained of before the justices, and had nothing to do with the question of their jurisdiction. Hawkins, J., said:—

"I have assumed as a fact, from the case taken, that Stanley was arrested and brought before the justices upon as illegal a warrant as ever was issued. A warrant signed by a magistrate, not only without any information on oath to justify it, but without any information at all. It follows that the magistrate who issued the warrant, and the defendant who with knowledge of its illegality executed it, were liable for an action for false imprisonment. He was brought into the presence of a magistrate to answer a charge which, up to that moment, had never been legally preferred against

him. Before these magistrates, and in his presence, the charge was made, over which, if duly made, they had jurisdiction. Upon that charge and in support of it it was that the defendant was sworn, and in giving his evidence swore corruptly and falsely * * They convicted him of an offence with which he had never legally been charged. In this, I am of opinion they were wrong; and upon this ground I am strongly inclined to think the conviction may be quashed."

It would be contrary to the settled rule, recognized in the interpretation of statutes, to make any alteration in the Common Law further or otherwise than the Act under consideration expressly declares: *Hardcastle's Construction and Effect of Statutory Law*, pp. 138, 139; *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193 at p. 203; *R. v. Morris*, L.R. 1, C.C.R. 90, and I do not think that section 145 of the Criminal Code has made so radical a departure in the common law rule, as to make a false oath in a judicial proceeding, before one having no authority, wilful and corrupt perjury. This section begins with a definition of perjury, and it then states the circumstances under which it may be committed.

By section 145, perjury is defined to be

"an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding, as a part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit, or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding."

Evidence in this section includes evidence given on the *voir dire*, and evidence given before a Grand Jury. This is the first part of the section. It is necessary that the witness be a witness in a judicial proceeding. There are two departures from the common law rule; the first is that one may be convicted of perjury on immaterial evidence, and the second relates to the *voir*

dire; the old rule was that an untrue statement which was not material could not subject the one who gave it to conviction of perjury, and one who is examined on the *voir dire* could not be contradicted, as the question of competence was a collateral question. Sub-section 2 of section 145 reads:—

“Every person is a witness within the meaning of this section who actually gives his evidence, whether he is competent to be a witness or not, and whether his evidence was admissible or not.”

This sub-section does not enlarge the boundaries of the common law jurisdiction, but is in strict accordance with the precedents which embrace the principle here laid down.

Sub-section 3 is as follows:—

“Every proceeding is judicial within the meaning of this section which is held in or under the authority of any Court of Justice, or before a Grand Jury, or before either the Senate or House of Commons in Canada, or any Committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly, or House of Assembly, or any Committee thereof empowered by law to administer an oath, or before any Justice of the Peace, or any Arbitrator or Umpire or any person or body of persons, authorized by law, or by any statute in force for the time being, to make an inquiry, and take evidence therein on oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a Court, Justice or Tribunal, having power to hold such judicial proceeding, whether duly competent or not, or whether the proceeding is duly instituted or not, before such Courts or person, so as to authorize it or him to hold a proceeding, and although such proceeding was held in a wrong place, or was otherwise invalid.”

I omit from consideration the provisions of this sub-section relating to perjury committed before any of the legislative bodies or committees thereof, empowered to take evidence upon oath, and look solely at those provisions relating to perjury committed

in respect to evidence taken before the other parties described in this sub-section. Now it will be seen that, leaving out legislative bodies with their committees, the section deals only with evidence taken in judicial proceedings, before persons legally competent to hold them, for the purpose for which the proceeding is had. A definition is given of what a judicial proceeding is within the meaning of this section; it is a Justice of the Peace, Arbitrator, Umpire, or any person or body of persons, authorized by law, or by any statute in force for the time being, to make enquiry and to take evidence therein upon oath. In other words, any of the parties mentioned must be authorized by law to exercise jurisdiction over the subject matter of the inquiry, and to take the evidence of witnesses upon oath. The proceeding must be a legal proceeding, having the sanction of the law behind it; but beside these, the proceeding may be before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding. If he has such power, then any irregularity in the constitution of the court, or any irregularity in the proceedings of the court, as in the common law cases to which I have referred, will not exempt one who has been duly sworn and has given false testimony from being convicted of perjury, but there is nothing in any part of this section which would surround with like protection the proceedings of one who is not a Justice of the Peace, or one who is not clothed with judicial authority, and who is not authorized to make an inquiry with the sanctions which attach to the proceedings of a legally constituted court.

I, therefore, hold that the decision of the court below should be reversed, and that Drew should be discharged, as not legally guilty of the crime of perjury for which he stands convicted.

Conviction affirmed (Taschereau, C.J., and Mills, J., dissenting.)

[MAGISTRATE'S COURT, DISTRICT OF BEDFORD,
QUEBEC.]

BEFORE H. W. MULVENA, ESQUIRE, DISTRICT MAGISTRATE.

STEELE v. MABER.

*Prize fight—Boxing exhibition—Sham encounter—Aiding and promoting—
Crim. Code, secs. 92, 94, 95.*

1. An exhibition of fighting with fists or hands to witness which an admission fee is charged to the public and at which it is announced that the stake money will go to the contestant who knocks out his opponent in a stipulated number of rounds is a "prize fight" within section 92 of the Criminal Code.
2. Such an exhibition made for gain must be viewed as it appeared or was intended to appear to the public, and it is no defence that the participants had merely feigned to fight.

SWEETSBURG, QUE., April 15, 1901.

MULVENA, District Magistrate:—Complaint was laid by William H. Steele against William A. Maber as principal and Henry Page, Joseph Page and Joseph Lareau as being present, advising, encouraging and promoting a prize fight at the town of Farnham on the 20th of March, 1901.

Article 92 of the Criminal Code defines prize fighting as follows:—

"The expression 'prize fighting' means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them."

Articles 94 and 95 provide for the punishment of offenders as follows:—

"Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, with or without hard labour who engages as a principal in a prize fight."

"Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment

for a term not exceeding twelve months, with or without hard labour or to both, who is present at a prize fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight."

The defendants plead to the charge that it was not a prize fight in the true meaning of the word, but an exhibition of scientific boxing; and second, that the whole thing was a pure farce and sham, and was so recognized by the audience.

The evidence for the prosecution shews that the alleged prize fight was advertized as a "Grand Athletic Exhibition between 'Shadow' Maber, champion of Canada, and an unknown;" that the contest would be under the "Marquis of Queensbury rules" for points, for a sum of \$200; the evidence further shews that it was held in a public hall in Farnham, on the 20th of March last, on a roped-in platform, that the principals were attired solely in trunks, with the addition of a belt; that the proceedings were conducted by a referee; that they were provided with a time keeper and seconds armed with towels and provided with chairs, to fan and revive the participants in the intervals between the rounds; that after the principals had been introduced by the referee and had duly shaken hands, according to the time-honored custom, defendant Maber informed the audience that he would have to "knock this gentleman out in fifteen rounds or forfeit his money;" that the first round was uneventful; that during the second round the unknown, introduced as William Henessey, of Boston, was knocked down, apparently, at all events, and lay moaning and twisting as if in great pain, until the referee had counted seven; and that then he struggled slowly to his feet, whilst Maber stepped back and magnanimously remarked that he would not knock him out then, that he would give the gentleman another show; that in the third round Henessey again went down, and this time remained down till the referee had counted ten, and was then carried from the platform apparently unconscious. One of the witnesses for the prosecution did not consider this a genuine "knock out," but others considered it

genuine enough, but too rapid for them to get their money's worth.

It is to be remarked that during these three rounds no attempt was made to count points, as advertised. It was merely, first, a knock down, and then a knock out.

The defence seems to rely almost wholly on the evidence of defendant Maber to prove the nature and extent of the contest. This witness denied having made use of the term "knock out" in his remarks about his adversary, and claimed he merely said he would have to "best" him in fifteen rounds or lose his deposit. (In this, however, he is flatly contradicted by five witnesses for the prosecution and by Lareau, one of the defendants.) He further claimed that the contest was merely an exhibition of scientific boxing; that there was nothing brutal or degrading about it; that the roped-in arena, the chairs, the seconds, the time-keeper, and the referee (the "master of ceremonies," as he euphoniously called him), were merely intended to attract the public; that the whole thing was a pure fake and sham, even to the pretended knock down and knock out blows; that Henessey had refused to perform because the receipts were too small, and had feigned unconsciousness, after being merely pushed down with the open hand, and stated in proof of this that the two pugilists had slept together in the same bed that night.

The other evidence for the defence consisted principally of the opinion given by the chief of police, the secretary-treasurer and two members of the police committee of Farnham, who had been present at the contest and found nothing immoral or unlawful in what took place. I note the fact, however, that these gentlemen were the recipients of complimentary reserved seat tickets from the management.

Article 92 has never been interpreted by the Courts, to my knowledge, nor do the debates in the House of Commons at the time the Act was passed throw any light on the subject.

Counsel on the one side pretend that in drafting this article it was the intention of Parliament to prevent any exhibition in the nature or semblance of a prize fight, and opposing counsel maintain that it was only meant to prohibit a genuine prize fight.

I am therefore compelled to interpret this article according to its literal and to me obvious meaning. It speaks of any "fight or encounter with hands or fists," etc. Take then this contest as advertised even. It was an encounter; it was "with fists;" it was "announced in advance" for the parties; it was "in public," and it was for a "stake or prize." Every feature of it is in plain contravention of Article 92.

But the proof goes much further. It plainly shews that it was intended to be, as far as the public was concerned, at all events, quite a different thing from the contest advertised. There was no attempt to count points. They sought to excite in the spectators all the demoralizing and degrading emotions of a genuine prize fight, to a finish—the roped-in arena, the seconds, the time-keeper, the referee, the knock down, the "twisting as if in pain," the knock out and subsequent unconsciousness, feigned if you will, all had this effect.

The defendants urge in mitigation of these appearances that the whole affair was in reality a fake, consequently a fraud and deception on the spectators. This line of defence is questionable, but cannot avail them in law. We must take it as it appeared and was intended to appear to the public or to most of those present.

I cannot come to any other conclusion but that the defendants are guilty of an infraction of the law; but as it is the first time that this has been invoked, I feel that the minimum punishment should be imposed.

I sentence, therefore, William A. Mabber as a principal in the encounter to three months in jail at hard labour.

As to defendant Henry Page, the evidence shews that he was the prime conductor and organizer of the fight; that he suggested Farnham as a suitable town where the fight should be pulled off; he sold the tickets at the hall, and was present within the hall when the fight occurred; I fine him \$50 and half the taxed costs or two months in jail.

As to Joseph Page, he was the direct agent of the principals.

He it was who applied to authorities at Farnham for permission to have the fight there, and was granted permission, he claims, by the mayor, and thereupon enclosed to that official ten complimentary tickets, for his use and that of the council; then he is refused permission by the council, whereupon he writes again to the mayor, chiding the secretary-treasurer for "usurping the prerogatives of the mayor," and after guaranteeing the innocuousness of the affair, deplores the injurious effect this refusal would have on the reputation of Farnham as a "sporting" town. He is clearly a promoter of the encounter. He is fined \$50 and one half of the costs or two months in jail.

As to defendant Lareau, I hold that he also is guilty, not because he was present as a spectator—Article 94 precludes that—but because he leased his hall for that purpose and got all the proceeds except the \$2 paid on account of license fee to the chief of police; but it is also evident he was not in the inner circle of the other defendants, who organized the scheme in Montreal, and he may have been misled, in ignorance of the law, as well as the mayor of Farnham, the chief of police, the secretary-treasurer and the police committee—therefore I suspend sentence on him for the present.

Defendants convicted.

Hon. G. B. Baker, K.C., for complainant.

W. A. Weir, K.C., for defendants.

Note: *Promoting prize-fights—Crim. Code, secs. 92-97.*

The fight must be for a prize or one on the result of which the handing over or transfer of money or property depends, otherwise it is not a prize-fight; sec. 97; but, where that is not shewn, it may still be punished under the latter section by a fine not exceeding \$50, if the fight were *bona fide* the result of a quarrel or dispute, and the other element of a prize fight existed, i.e., the previous arrangement to meet for the purpose of a fight with fists or hands. Sec. 92.

Sections 6, 7 and 10 of the Act respecting prize-fighting, R.S.C., 1886, ch. 153, still remain in force (Code sec. 983). They are as follows:—

(6) If, at any time, the sheriff of any county, place or district in Canada, any chief of police, any police officer, or any constable, or other peace

Notes—Continued.*Promoting prize-fights—Crim. Code secs. 98-97.*

officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge, and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest; and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the gaol of the county, district or city within which such inquiry takes place, or if there is no common gaol there, then to the common gaol which is nearest to the place where such inquiry is had, there to remain until he gives such recognizance with such sureties.

(7) If any sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and preventing such fight,—and he shall, with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before some person having authority to try offences against this Act, to be dealt with according to law, and fined or imprisoned, or both, or compelled to enter into recognizances with sureties, as hereinbefore provided, according to the nature of the case.

(10) Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice of the peace with respect to offences against this Act.

A sparring match with gloves, fairly conducted, is not unlawful. *R. v. Young*, 10 Cox. C.C. 371. If, however, the parties meet intending to fight till one gives in from exhaustion or injury received, such fighting is unlawful whether the combatants fight with gloves or not. *R. v. Orton*, 14 Cox C.C. 226.

The injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-

Note—Continued.

Promoting prize-fights—Crim. Code, secs. 92-97.

fighte are disorderly exhibitions, mischievous on many obvious grounds. *R. v. Coney*, 8 Q.B.D. 534, 30 W.R. 678, per Stephen, J. The consent of the parties to the blows which they may mutually receive does not prevent those blows from being assaults. *Ibid.*

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, C.J.K.B., STREET, J., AND BRITTON, J.,
SITTING AS A DIVISIONAL COURT.

THE KING v. WALSH.

Ontario Election Act—Voting on the Liquor Act (Ont.) 1902—Special court to try balloting offences—Legislative power of province to confer judicial authority on county judge outside of his county—Summary trial by special court without a jury—Adjournment for sentence—Validity of reference to public vote to bring statute into force—2 Edw. VII. (Ont.) c. 33.

1. The Ontario legislature has power to enact as part of a statute respecting the sale of intoxicating liquors that a vote of the electors of the province shall be taken upon the question of bringing the Act into force, and that the restrictive part of the statute shall become operative only upon an affirmative vote of a stated proportion of the electors and upon a proclamation to be thereupon issued.
2. The provisions contained in the Liquor Act (Ont.) 1902, for the designation of a county judge to "conduct the trial" of persons accused of illegal acts in the taking of the vote of the electors and making the procedure of the Ontario Election Act applicable thereto constitutes the judge selected thereunder a special court to summarily try the offenders without the right to a trial by jury.
3. A county judge duly designated and acting under the Liquor Act (Ont.) 1902, may, after finding the accused guilty, adjourn the court to a later date for the purpose of passing sentence upon him.
4. Such judge may issue the preliminary process in a prosecution under that statute in the county for which he holds his judicial commission and may hold the trial in another county.

ARGUED: February 12, 1903.

DECIDED: March 12, 1903.

MOTION to quash a conviction made by Archibald Bell, Esquire, County Court Judge of the County of Kent, under the Ontario Liquor Act of 1902.

The proceedings which were here sought to be quashed were taken under the 4th sub-section of section 91 of the Liquor Act, 1902, which is as follows :—

(4) In case a county or district crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting under this Part he shall forthwith notify the President of the High Court at Toronto who shall designate a judge of a county or district court of a county or district other than that in which such offence was committed, to conduct the trial of the persons accused and the procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under section 188 of the Ontario Election Act and amendments thereto.

The question referred to the electors by the 2nd section of the Act, i.e., "Are you in favour of bringing into force the Liquor Act, 1902," was voted upon throughout the Province on the 4th December, 1902, and an insufficient number of affirmative votes were cast to authorize a proclamation to bring part 2 of said Act into effect.

The county crown attorney of the county of Elgin notified the President of the High Court of Justice for Ontario at Toronto that he had reason to believe that the defendant had committed or attempted to commit the offence of placing or attempting to place unauthorized ballots in the ballot box used in polling subdivision No. 4 for the city of St. Thomas.

Thereupon the President of the High Court of Justice designated His Honour Judge Bell, county Judge of the county of Kent, to conduct the trial of the persons accused.

Judge Bell thereupon issued a summons calling on the defendant to appear before him on 29th December, 1902, at the court house in St. Thomas to answer the charge that he did fraudulently attempt to put into the ballot box used at the said polling subdivision No. 4 a paper other than the ballot paper authorized by law to be put in, contrary to the provisions of

section 191 of the Ontario Election Act and section 91 of the Liquor Act, 1902.

The defendant did not appear in person at the time and place named, but counsel appeared for him and applied for an adjournment; the trial, as appears by the conviction, was continued on that day and on the 19th and 20th of January, 1903, and on the 3rd of February, 1903; and the Judge, having heard witnesses in support of the charge, as well as for the defence, found the defendant guilty and sentenced him to be imprisoned for one year in the common gaol of the county of Elgin.

On the 6th February, 1903, a rule *nisi* was granted by a Divisional Court upon the application of the defendant, and upon reading the papers returned under a writ of certiorari and the affidavit of John A. Robinson ordering Archibald Bell, Esq., purporting to act under section 91 of the Liquor Act, and D. J. Donahue, clerk of the peace for the county of Elgin, to shew cause why the conviction should not be quashed.

TORONTO, February 12, 1903.

J. A. Robinson, for the motion. The referendum or taking the votes of the electors provided for in 2 Edw. VII. ch. 33 (O.) is illegal, as there is no power in the Legislature to take the opinion of the voters: *Davies v. The City of Toronto* (1887), 15 O.R. 33 at p. 39. It is derogating from the prerogative of the Crown to give power to the people to nullify any legislation. An amendment of the constitution would be necessary to do this: *Fielding v. Thomas* (1896), *Wheeler's Confederation Law of Canada*, 1079. There was no judicial authority in the county judge to try the offences and award punishment; more extensive words are required than those used in sub-sec. 4 of sec. 91, 2 Edw. VII. ch. 33 (O.) viz., "*to conduct the trial of the persons accused.*" Under these words he might not be more than a prosecutor. He should have been appointed under the seal of the Dominion

or the Province. In the absence of special provision there should have been a trial by jury: Paley on Convictions, 7th ed., pp. 3, 7, and 9. A county judge has jurisdiction only in his own county: *In re County Courts of British Columbia* (1892), 21 S.C.R. 446. The summons should not be issued in one county returnable in another. The place of trial is a matter of jurisdiction, and it was "procedure" only that was incorporated by sec. 91 of the Liquor Act of 1902. The Judge adjudicated on the case on one day and passed sentence on another; there is no power to divide the judgment: *The King v. Dimpsey* (1787) 2 T.R. 96 at p. 97; *The King v. Harris* (1797), 7 T.R. 238; and the charge should be formally laid before him before he issued his summons, and the sentence should not have been passed in the absence of the accused: *The Queen v. Williams* (1870), 18 W.R. 806. The offence was not a crime, so attempting to do it is not a crime. The words "he is authorized," contained in the summons, are used in sub-sec. (c) of sec. 191 R.S.O. 1897, ch. 9, and would apply only to the deputy returning officer; the words used in the conviction were "authorized by law to be put in," which extend the offence: *Martin v. Ford* (1793), 5 T.R. 101; *Bennett v. Edwards* (1827), 7 B. & C. 586; *Jenkinson v. Thomas* (1792), 4 T.R. 665. The Judge should only deal with offences for which money penalties are prescribed: sec. 91, sub-sec. 2; here the punishment is imprisonment. A new statute and criminal law must be strictly construed: *Rumball v. Schmidt* (1882), 8 Q.B.D. 603.

John Cartwright, K.C., Deputy Attorney-General, and *J. D. Donahue*, K.C., contra. The Legislature has unlimited power within its area: *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437, at p. 442. In this case the statute is only to become law by proclamation, but even that limitation is not necessary in order to render the enactment valid. The summons may be issued anywhere under sec. 188 R.S.O. 1897, ch. 9, and no information is necessary. The county Judge is to preside

at the trial, and having the procedure under sub-sec. 4 of sec. 91 2 Edw. VII. ch. 33 (O.) has a Court. See also Murray's Dictionary, tit. "Conduct."

TORONTO, March 12, 1903.

FALCONBRIDGE, C.J. :—Objection 10 in the order *nisi* is that the statute providing for the voting under the Liquor Act was unconstitutional and void.

We practically disposed of this point at the argument and it is sufficient now to say that while the apparent derogation of powers of the Crown and of the Legislature and delegation of those powers to a popular vote may be startling propositions to the student of constitutional history, yet they seem to be within the legislative authority of the Provincial Parliament. As to the plenary authority of a Provincial Legislature within its prescribed limit of subject and area, see *Hodge v. The Queen* (1883), 9 App. Cas. 117; *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437 at p. 442.

The preliminaries prescribed by the Liquor Act, 1902, ch. 33, sec. 91 (4) (O.), seem to have been complied with.

The county crown attorney notified the President of the High Court (of Justice) that he was informed or had reason to believe that corrupt practices or illegal acts had been committed in his county in connection with the voting, and the President designated the Judge of a county other than that in which the offence was committed "to conduct the trial" of the persons accused.

The serious point of the case is in the words "to conduct the trial." Does this phrase convey the power to try (*i.e.*, summarily) to convict and to award a punishment?

I do perceive here "a divided duty," viz., to give a strict construction to words in favour of life or of the subject's liberty, and also if possible to carry out the manifest will of the Legislature.

Not without much doubt and hesitation I arrive at the conclusion that the reference in the section to the procedure under section 188 suffices to confer on the designated Judge these powers for which apt words have not been otherwise used.

There is nothing in the other objections which were taken.

The motion must be dismissed, under the circumstances, without costs.

STREET, J.:—Objection was taken in the rule *nisi* to the proceedings upon several grounds.

It was objected rather than argued that the whole Liquor Act, 1902, was unconstitutional, because the Legislature had referred the question mentioned in sec. 2 to the vote of the electors instead of deciding it themselves.

I am unable to see any force in this objection: the proceeding is not usual certainly, but it seems well within the power of the Legislature: and they reserve to themselves the power to deal with the question after the vote is taken.

The main objection, and certainly the most serious one, is that which goes to the root of the whole proceeding, and sets up that the Legislature has not properly constituted any court or given to any person the necessary authority to try and convict and sentence persons for infractions of "The Liquor Act, 1902."

The only section under which it can be contended that any court or person has been constituted or authorized to deal with offences under the Act is the 4th sub-sec. of sec. 91 of the Liquor Act, 1902, which is as follows:—

"(4.) In case a county or district crown attorney is informed or has reason to believe that any corrupt practice or other illegal act has been committed in his county or district in connection with the voting under this part, he shall forthwith notify the President of the High Court at Toronto, who shall designate a Judge of a county or district court of a county or district other than that in which said offence was committed, to conduct the trial of the persons accused, and the

procedure thereon shall be the same as nearly as may be as on the trial of illegal acts under section 188 of the Ontario Election Act and amendments thereto."

This language certainly falls far short of what one would expect to find in a section intended to create a new tribunal for dealing with an offence created by the statute of which it forms part. There is, however, no doubt that the Legislature did intend to declare that persons committing certain specified acts should be liable to certain prescribed punishments, and did intend by this sub-section to create a tribunal with authority to try them.

"The President of the High Court at Toronto" may, without difficulty, be taken to mean "the President of the High Court of Justice for Ontario," and he is authorized to "designate a Judge of a county or district court . . . to *conduct the trial* of the persons accused: and the procedure thereon shall be the same as nearly as may be, as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto."

If we are to read the words "to conduct the trial" in their strict literal sense and as meaning merely that the Judge designated is to preside upon the hearing of the evidence for and against the person charged, the result is to make the clause useless, because no other provision is made for bringing the person charged before the court for trial, or for sentencing him afterwards.

Having in view the plain general intention of the Legislature, I think it our duty to struggle to give to the language of the section a construction which will best carry that intention into effect.

I think we may gather that the intention was to create a court consisting of the Judge, designated for each case by the President of the High Court of Justice, for the trial of the person charged: and to give to the court so created, under the general power "to conduct the trial," the power to bring the person charged before the court, to try him for the offence, and

to sentence him if found guilty, for all these powers are conferred upon the Judges in sec. 188 of the Ontario Election Act, which is incorporated by reference in sub-sec. 4 of sec. 91 of the Liquor Act, 1902. I think this construction of sub-sec. 4 is justifiable as being a necessary implication from its expressed intention, and is, therefore, no violation of the rule that statutes creating special jurisdictions are to be strictly construed.

Another objection was that His Honour Judge Bell, being the Judge of the county court of the county of Kent, could not act out of his own county, and that he could not issue his summons in Kent and try the defendant in Elgin.

The answer to this is that he was not acting as a county Judge at all in the matter, but as a court specially created by the Act, and that the Act intends the county Judge who is designated to act out of his own county in holding the actual trial: there seems no reason why he should not issue his summons in his own county or elsewhere. Nor does there seem any reason why, having found the defendant guilty on 20th January, 1903, he should not adjourn the court until 3rd February, 1903, as he did, for the purpose of sentencing him, as he did, upon that day.

The charge in the summons is in the words of sub-sec. (c) of sec. 191 of the Ontario Election Act, and is, I think, unobjectionable in point of form.

The motion to quash must, therefore, be dismissed. No costs.

BRITTON, J.:—William Walsh was convicted by Judge Bell of the offence of fraudulently attempting to put into the ballot box used at polling subdivision 4 in the city of St. Thomas, at the vote on the referendum, on the 4th December last, a paper other than the ballot paper authorized by law to be put in.

Attempting to do such a thing is an offence under sec. 191 of the Ontario Election Act, and this sec. 191 is one of the sections made part of the Liquor Act, 1902.

It was argued that sec. 191 can apply only to a returning officer or deputy returning officer, because under sec. 58 of the Liquor Act, 1902, only the deputy returning officer has control of the ballot box, and he alone is authorized to receive a ballot from the voter and put it in the box. After that the box is delivered to the returning officer. It is said that this sec. 191 is aimed against "stuffing the ballot box" by an officer having charge of it. The section is wide enough to meet the case of an offending returning officer or deputy returning officer, but it is not limited to these officers. The words of the section are "no person shall," etc., etc., "no person shall attempt," etc.

It follows that any person who does, etc., or who attempts to do so is guilty.

As there was evidence on which Judge Bell could act, if he had jurisdiction, there can be no review of his finding.

The main objection upon which the matter was ably argued by Mr. Robinson was that Judge Bell had no jurisdiction to try for the offence. This involves the consideration of sec. 91 of the Liquor Act, 1902.

The fundamental principle of interpretation is that the intention of the Legislature is "to be accepted and carried into effect." A statute is to be expounded "according to the intent of them that made it." See Maxwell's Interpretation of Statutes, 3rd ed., pages 1, 2.

The Legislature of Ontario had power to constitute a court. The offences to be dealt with are those against an Ontario statute.

There can be no doubt that the Legislature intended by sub-sec. 4 of sec. 91 of the Liquor Act, 1902, that, upon the designation of "a Judge of a county . . . to conduct the trial of the persons accused," such Judge should be a court with all necessary power to try the persons accused of offences mentioned in that section, and to punish such persons according to law if they are found guilty.

The procedure on the trial conducted by that Judge "shall be the same as nearly as may be as on the trial of illegal acts under sec. 188 of the Ontario Election Act and amendments thereto."

Section 187 of the Ontario Election Act is as follows: "Any two of the Judges appointed for the trial of election petitions shall be and constitute a court for the trial of all corrupt practices and other illegal acts committed during an election, being offences in respect of which this Province has legislative authority."

Section 91 of the Liquor Act, 1902, constitutes the designated county Judge a court for the trial of offences under that Act.

Section 188 of the Ontario Election Act establishes the procedure for trial before the constituted election court of offences under that Act.

Section 91 of the Liquor Act, 1902, adopts that procedure "as nearly as may be" on the trial before the court constituted for the trial of offences under the Liquor Act.

Either the words used in sub-sec. 4, sec. 91, are absolutely without meaning, or they are sufficient to constitute a court.

If the procedure is not wholly covered by what is expressly stated, anything lacking in mere procedure must be implied. "Where an Act confers a jurisdiction, it impliedly grants, also, the power of doing all such acts, or employing such means, as are essentially necessary to its execution: Maxwell, 3rd ed., p. 500.

The objection to the want of territorial jurisdiction, where the designated county Judge acted, is not well taken.

The alleged offence was committed, if at all, in the county of Elgin; therefore, under the statute, the Judge designated must be a Judge of some other county than Elgin. And such designated Judge, if he could act at all, could, under sec. 188 of the Ontario Election Act, have the summons issued or returnable at any place in the Province.

This is very sweeping, but such is the Act.

In this case the accused was not inconvenienced, nor in any case is any accused person likely to be inconvenienced by being summoned to any remote place.

The other objections to the conviction must be overruled. The cases cited by counsel for defendant have little or no bearing, as the proceedings are under the particular statutes now considered.

I agree that the motion should be dismissed without costs.

Motion dismissed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., IN CHAMBERS.

BEFORE WEATHERBE, J., IN CHAMBERS.

THE KING v. SHEPHERD.

Keeping bawdy house—Describing the offence—"House, room, set of rooms or place of any kind"—Uncertainty in conviction—Summary trial by Magistrate—Consent irregularly obtained—Omission of magistrate to state option of jury trial—Crim. Code, secs. 195, 198, 786.

1. *Per Townshend, J.*—After the accused consents to summary trial before a magistrate under Code section 786, it is not necessary for the magistrate to again "reduce the charge to writing" if that had been done before the consent was given, and it is sufficient for the magistrate to read to the accused the charge already written..
2. *Per Townshend, J.*—A conviction by a magistrate on a summary trial for keeping a common bawdy-house need not specify the location of the house further than to shew that it was at a place within the jurisdiction of the Court.
3. *Per Townshend, J.*—A conviction for keeping a common bawdy-house is sufficient without the addition of particulars shewing what part of the statutory definition given by the Code section 195 is the basis for the adjudication.
4. *Per Weatherbe, J.*—Section 195 enlarges the meaning of the term "common bawdy-house," and it is necessary that a conviction for keeping "a disorderly house, that is to say a bawdy-house," should shew further particulars of the offence by specifying what was the subject of the keeping for purposes of prostitution, i.e., whether a "house," "room," "set of rooms" or other "place," so as to come within the definition of sec. 195 referred to in sec. 198.
5. *Per Weatherbe, J.*—A consent to "summary trial" under Code section 786 given to the magistrate without the option of a jury trial being expressly stated to the accused, is invalid and a prisoner held upon a conviction based upon such consent must be discharged upon *habeas corpus*.

DECIDED: November 11, 1902.

DECIDED: November 28, 1902.

MOTION under ch. 181 of the Revised Statutes of Nova Scotia, 1900, on the return of a writ of habeas corpus for the discharge of Sarah Shepherd, a prisoner in the city prison at Halifax under a warrant of commitment in execution signed by the Stipendiary Magistrate of the city of Halifax and reciting a conviction made against her under secs. 198 and 785 of the Criminal Code by that officer "for that she, the said Sarah Shepherd, did in the city of Halifax in or about the

month of September, A.D. 1902, keep a disorderly house, that is to say, a common bawdy house on Albermarle Street, in the city of Halifax," and whereby it was adjudged, under the powers conferred by sec. 958 of the Code, that she forfeit and pay a fine of \$60 to be paid and applied according to law, and in default of the payment of the said fine forthwith she was ordered to be imprisoned in the city prison at Halifax for the space of five months.

The record of the convicting magistrate was brought up under an order obtained by the Attorney-General under sec. 7 of the said chapter.

This application was first made to Townshend, J., in Chambers, on November 7th, 1902, and that learned Judge having refused the motion, the prisoner renewed her application before Weatherbe, J., in Chambers, on November 21st, 1902, the same counsel appearing.

On this later application the additional ground was urged on behalf of the prisoner that the magistrate, when he obtained the prisoner's consent to a summary trial, did not inform her of her right to a trial by jury, alternatively with her right to consent to be tried before him. The grounds relied on appear from the judgments.

HALIFAX, November 7, 1902.

John J. Power, for the prisoner.

Andrew Cluney, for the Attorney-General of Nova Scotia.

HALIFAX, November 11, 1902.

TOWNSHEND, J.:—The defendant contends that the conviction is bad for these reasons:

Firstly, that the offence is not sufficiently charged, or perhaps to put it more correctly, that no offence is charged therein. The words are "did in the said city of Halifax in or about the month of September, 1902, keep a disorderly house, that is to

say, a common bawdy house, on Albermarle Street, in the said city of Halifax."

Section 198 of the Code makes this an offence adding the words "as hereinbefore defined." Section 195 defines a common bawdy house as a "house, room or set of rooms, or place of any kind kept for the purposes of prostitution."

The objection is that the want of the words "to wit, a house, etc., for the purposes of prostitution" in the conviction, render it defective and void. The decision of Armour, C.J., in *Reg. v. Spain*, 18 Ont. R. 385, is relied on, but in my opinion the cases are in no respect similar. I think the offence is sufficiently stated. The law defines a common bawdy house, and it is found she kept one as stated. No more is necessary. There is no authority for the form in Crankshaw, which, no doubt, would be a good, although not a necessary one.

Secondly, she urged that the Magistrate did not reduce the charge to writing after he had obtained the accused's consent to be tried. I think what he did was quite within the meaning of the law. There is no objection to his having read to her what he had already written out as in this case.

Thirdly, she objected that the exact place is not stated in the conviction and that location is necessary. Defendant relies on *Reg. v. Cyr*, 12 P.R. (Ont.) 24, where O'Connor, J., held that a conviction for keeping a house of ill fame in the city of Ottawa was bad.

I think here, however, that the locality is sufficiently set forth on Albermarle Street in the city of Halifax. It is quite clear that it is in a place within the jurisdiction of the Court. In *Commonwealth v. Shea*, 150 Mass. 314, the Court held in a similar case that "at Boston" was right. See that case and authorities cited; also *Commonwealth v. Parker*, 1 Allen (Mass.) 1, where a similar view was adopted as to the sufficiency of locality. In American and English Ency., vol. 9, p. 536, are a large number of American cases to same effect. The prin-

ciple laid down is that the location of the house need not be alleged further than to shew that the Court had jurisdiction. I prefer to follow these authorities.

The defendant's discharge is refused.

The application was renewed before WEATHERBE, J., in Chambers, on November 21st, 1902.

HALIFAX, N.S., November 28, 1902.

WEATHERBE, J.:—"A common bawdy house," by sec. 195 of the Code, is defined to be "a house, room, set of rooms, or place of any kind, kept for the purpose of prostitution."

This conviction was made under sec. 198 for keeping "any disorderly house, that is to say, any common bawdy house . . . as hereinbefore defined."

A tent, shed or camp or other place may be brought within the Act, provided it be used for the purpose as defined by the Act. See Am. & Eng. Ency. of Law, 2nd ed., vol. 9, p. 512.

The definition in the Code it seems to me, which enlarges the meaning as formerly understood (Burbidge's Digest Criminal Law of Canada, p. 174, art. 233), must be resorted to to describe the crime and give the proper notice. Whatever the place may be, that "place" must be used "for purposes of prostitution," to constitute the crime. For this reason I think it is not refining too much to require a more complete statement than that set forth in the conviction. See Crankshaw's Criminal Code, 2nd ed., p. 594; and 2 Chitty's Criminal Law, pp. 38, 39, 40; 4 Chitty's Criminal Law, p. 68; *The Queen v. Stannard*, Leigh & Cave, p. 349; *Commonwealth v. Shea*, 150 Mass. p. 314, as to forms used prior to the Code. Also Burn's Justices, 13th ed., vol. 1, p. 1119; *R. v. Chapman*, Sayers' Reports, p. 203; *Reg. v. Spain*, 18 Ont. R. 385, for the rule in stating charges of this kind.

The magistrate in this case did not, it appears, inform the accused as required by sec. 786 of the Code, of her right of trial

by a jury in obtaining her consent to be tried by him. I think the option of a jury trial ought to have been placed before the accused by the magistrate before he obtained her consent to a summary trial, and this view seems to be confirmed by the case of *The Queen v. Cockshott*, [1898] 1 Q.B. 582, under a similar statute in England, where a consent was obtained to a summary trial without the necessary information being imparted to the accused.

The prisoner must be discharged.

Prisoner discharged.

Note: Keeping a disorderly or bawdy house—Cr. Code secs. 195, 198, 786.

In *Reg. v. Cyr* (1887), 12 P.R. (Ont.) 24, the conviction by a magistrate was held bad on three separate grounds, and the accused was discharged on habeas corpus by O'Connor, J. The conviction was for keeping a house of ill-fame on a stated day, "at the city of Ottawa." O'Connor, J., held that the conviction was bad for uncertainty, and in the course of his judgment he said:—

"If the prisoner were charged again for an offence of the kind on the same day at the city of Ottawa, would this conviction be on the face of it a bar to further proceedings, as it ought to be? No; for non constat she may have kept more than one house of the same kind at the city of Ottawa, at the same time, and at all events the precise time is not material. It would be no answer to an indictment, and a plea of the kind in a civil action would be demurrable. The nature of the offence is such that there is no difficulty in stating a place certain."

In *R. v. McKenzie* (1885), 2 Man. R. 168, the conviction and commitment were for "keeping a bawdy house for the resort of prostitutes." It was contended on habeas corpus that the conviction was for two offences and was therefore bad. Wallbridge, C.J., said:—

"To keep a house for the resort of prostitutes is an offence; does it change it into two offences by adding the word 'bawdy'? If the word 'house' had been repeated a second time, then two offences would have been charged. The Act makes it an offence to keep a house for the resort of prostitutes. It is contended because the house in the commitment is called a bawdy house that there is of necessity two offences in the same commitment. To keep any house for the resort of prostitutes is an offence, and to call that house a bawdy house does not render keeping it less a crime. In my opinion there is but one offence charged in the commitment."

In *Reg. v. Spain* (1889), 18 O.R. 385, referred to, *supra*, the defendant

had been summarily convicted for that he did at a day and place named "unlawfully and maliciously commit damage, injury and spoil to and upon the real and personal property of the Long Point Company," for which offence a fine was inflicted. Upon the conviction being removed by certiorari, the court (Armour, C.J., and Street, J.) held the conviction bad because it did not describe the offence with sufficient certainty. Armour, C.J., referred to *Re Donnelly*, 20 U.C.C.P. 165, and said:—

"It is true that it is alleged in the conviction, in the very words of the statute, R.S.C., ch. 168, sec. 59, under which the defendant was convicted, that the defendant 'unlawfully and maliciously committed damage, injury and spoil' to and upon the real and personal property of the Long Point Company, but this is not sufficient without its being alleged what the particular act was which was done by the defendant, which constituted such damage, injury and spoil, and what the particular nature and quality of the property real and personal was, in and upon which such damage, injury and spoil was committed."

It has been held that a house occupied by one woman for the purpose of prostituting herself therein with a number of different men, but without allowing other women to use the premises for a like purpose, is not a "bawdy house." *Rev. v. Young* (1902), 6 Can. Cr. Cas. 42, per Killam, C.J.; *Singleton v. Ellison*, [1895] 1 Q.B. 607; *State v. Calley*, 104 N.C. 858.

The form of indictment given by Mr. Crankshaw (Crankshaw's Crim. Code, 2nd ed., p. 594) for the offence of keeping a bawdy house, and referred to in Judge Weatherbe's judgment, *supra*, is as follows:—

"The jurors for our lord the King present that at ——— on ——— and on and at divers other days and times since that date, A. and B., the wife of the said A., did keep and maintain a disorderly house, to wit, a common bawdy house, by keeping and maintaining a certain house (or room, or set of rooms, etc.) situate and being ——— for purposes of prostitution."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, J., GRAHAM, E.J., AND
MEAGHER, J.

THE KING v. PHINNEY (No. 1).

Theft—Plea of insanity—Instruction that no evidence in support—Question of law—Verdict of not guilty because of insanity—Case reserved on Attorney-General's application—Motion to quash—Placing a prisoner twice in jeopardy—Cr. Code, secs. 11, 305, 736, 743, 744.

1. A case may be reserved at the instance of the Crown upon a question of law as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground.

ARGUED: February 6, 1903.

DECIDED: March 10, 1903.

MOTION to quash the following case reserved by Weatherbe,
J.

The grounds for the motion are referred to in the judgments.

"The prisoner was indicted for theft under sec. 305 (a) of the Criminal Code. By way of defence the witness called three witnesses; his father, Dr. Samuel C. Primrose, and Dr. Gideon Barnaby, to prove insanity at the time of the offence.

"His father, Zaccheus Phinney, testified that the prisoner was seventeen years old last June, and that between the ages of ten and thirteen he had suffered from epileptic fits. Dr. Primrose was the family physician, and examined him, and had recommended an operation, which witness then consented to have performed. The doctor then did not have the necessary instruments, but sent for them. However, the fits had ceased, and for some unexplained reason (if one existed beyond the cessation of the fits) the operation was never performed. The witness also testified that the prisoner at one time borrowed a gun from a neighbor and left home very suddenly one afternoon in his every day clothes and unbeknown to the witness. He wrote home a few days later from Windsor, saying he

had no money, and asking that some be sent him to enable him to return. Money was sent and he returned. He said on his return that he had sold the gun for \$2.00. Witness said the gun was worth \$10.00, and that he paid the owner that amount. This witness was not asked in direct examination whether any facts or incidents in the prisoner's life had impressed him as being rational or otherwise, (see *People v. Strait*, 148 N.Y. 566) but on cross-examination he said that he did not think the gun episode indicated insanity, and he also stated that the prisoner was a wayward boy.

"Dr. Primrose testified that he was the family physician, and that he had attended the prisoner for about three years for epileptic fits. He found that the prisoner had an adhesion of the prepuce to the glans penis, which would very likely cause irritation in the genital zone. He recommended an operation, and sent for the necessary instruments, but the fits ceased and the operation was not performed. In his opinion this adhesion might cause epileptic fits, and after they disappeared might continue to cause explosions on the nerve centres, at which times prisoner would be insane. He had not noticed prisoner during the four years last past, except as he might meet him on the street, until he visited him in the jail after he had been arrested for theft. On cross-examination he stated that at the time he saw the prisoner in jail he considered his moral preceptive powers fairly good.

"Dr. Barnaby testified that he had examined the prisoner in jail about ten days after the offence, and he thought that he was only partly responsible, and that he appeared to be light-hearted and exhibited a spirit of bravado. This one instance was the only one he testified to.

"Neither doctor was asked to assume the truth of the facts testified to by the father and give an opinion of the prisoner's mental condition.

“The act of theft was admitted, but it was contended for the prisoner by his counsel that the foregoing evidence was sufficient to establish his insanity.

“The jury were directed by the trial Judge that there was no evidence of insanity, and that the case did not therefore come within section 736 of the Code, and the jury were therefore directed by the Judge to find a verdict of guilty.

“The jury, however, found the prisoner not guilty by reason of his insanity at the time of the commission of the offence.

“The questions served for the Court are (1) whether there was evidence of insanity as required by section 736, and if not (2) whether there should be a new trial?”

HALIFAX, N.S., February 6, 1903.

J. J. Ritchie, K.C., for the prisoner.

Hon. J. W. Longley, K.C., Attorney-General, contra.

HALIFAX, N.S., March 10, 1903.

TOWNSHEND, J.:—The accused was acquitted by the jury on the ground of insanity at the time of the commission of the offence in the face of the Judge's instructions that there was no evidence of insanity. The learned Judge has reserved for our consideration two questions: (1) Was there any evidence of insanity; (2) If not should there be a new trial? Counsel for the accused has moved to quash the case reserved on the ground that where there has been an acquittal the Crown cannot have a case reserved, nor an appeal. Unquestionably at Common Law where the jury found the prisoner not guilty no further proceedings could be taken. Neither the Crown nor the prosecutor could on the same charge have the prisoner again tried, nor was there any power in the Court to review the verdict of the jury. Has the law in this respect been changed by the Code? Sec. 743 to 751 deal with appeals. After taking away the right of proceeding by writ of error sec. 743 provides by sub-sec. 2

that the Court may reserve any question of law for the opinion of the Court of Appeal in manner hereinafter provided. Sub-sec. 3 says "Either the prosecutor or the accused may apply to the Court to reserve any such question of law and if refused the Court must make a note of the objection." Sec. 6, if the question is reserved a case shall be stated for the opinion of the Court of Appeal.

Here the question was reserved by the Court, and the Attorney-General now asks that the verdict acquitting the accused by reason of insanity be set aside, and a new trial ordered. The question reserved is was there any evidence of insanity, and assuming that to be a question of law I come to the conclusion it is competent for the Crown to have it reserved and decided by the Court, even though there has been an acquittal. If this were not so, then there are important words in the Statute to which no meaning can be given. It can hardly be supposed that in such an important Statute founded on the English Draft Act which was only prepared after the most thorough investigation, that words of such importance could have been unadvisedly used. It is quite evident that sec. 744 and sec. 746 are to be read together, specifying as they do the procedure to be adopted when the Judge refuses to reserve the point taken, but is obliged nevertheless to make a note of it. Sec. 744 distinctly states "If the Court refuses to reserve the question the party applying may move the Court of Appeal as hereinafter provided." These provisions are contained in sec. 746, sub-sec. 2, etc.

Sub-section 2 of sec. 744, says, "The Attorney-General or party so applying may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court for leave to appeal, etc."

If the contention of the accused is to prevail, that acquittal is an end to all further proceedings, for what purpose or object is notice to be given to the accused? What object would there be on the part of the Crown in appealing to the Court or having a question reserved heard by the Court when the accused

is absolutely free from further prosecution on that charge? It seems to me that the above considerations are conclusive on the question, although I confess where such a radical change has been made in the Common Law it would have been more satisfactory had more explicit language been used in the Statute.

There are few cases to be found where the point has been raised of the right of the Crown or prosecutor to obtain a new trial when acquittal has been the result. No doubt this is due to the rare occasions in which the Crown has deemed it necessary or expedient to enforce it. When the jury have found the accused "not guilty" it has been for so long the established law that the accused shall not again be put on trial for the same offence, and the power has been exercised so seldom that it is somewhat difficult to realize the change. One case, however, is to be found in 3 Can Cr. Cas., p. 9 (*The Queen v. Williams*), where the Crown made the application. In the case of *The Queen v. Williams*, decided in the High Court of Justice, Ontario, sitting as a Court of Appeal for Crown cases reserved, it was held that notice of an application by the Crown for a new trial and of the hearing of a case reserved on the Crown's application where the accused had been acquitted on the trial should be served on the accused personally. In that case the accused was charged with manslaughter and acquitted, but the Crown sought to obtain a new trial, and obtained a reserved case upon the question as to whether the depositions of the accused at the Coroner's inquest were admissible against him, the trial Judge having rejected the same. The Court held that the solicitor's authority would prima facie be terminated upon the defendant's discharge from custody on his acquittal; that there is in such case no cause pending which the Appellate Court can hear unless a new trial is moved for and notice duly served; and as no one appeared for the defendant the case was directed to stand over until notice of the application for a new trial had been served personally on the defendant.

No question or doubt appears to have been suggested as to the right of the Crown to do so, and the Court acting under

the provisions of sec. 744 directed the accused to be personally notified of the application. Some observations of the Judge in the Court of King's Bench, Quebec, in *The King v. Trepanier* (1901), 4 Can. Cr. Cas. 259, were referred to by the counsel for the prisoner which at first sight appear to be at variance with the views above expressed, but on closely reading them it is evident they referred to a case reserved at the instance of the accused, which, of course, lapsed if he were acquitted. Mr. Crankshaw in his note on sec 744, et seq. I think correctly states the effect of the Statute. "It will be seen," he says, "from the wording of these two sections 743 and 744 and section 746 that on points of law an equal appeal is given to the Crown and the accused. But in regard to questions of fact it will be seen by sec. 747 as well as by clauses (d) and (e) of section 746 that the right to move for a new trial is not given to the Crown but only to a convicted defendant."

Whether there was any evidence of insanity at all is clearly a question of law—the sufficiency of the evidence, when there is any, is, of course, for the jury. That point has yet to be heard, but I am of opinion the Crown have the right to move and this motion must be dismissed.

GRAHAM, E.J.:—This is a motion to quash a case reserved by a Judge on a criminal trial. The question is to what extent the Crown in indictable offences may have questions of law reviewed in this Court of Appeal. There is no power to review questions of fact upon the application of the Crown. Section 747 only gives that right to a defendant.

In 743 (2) it is provided "The Court before which any accused person is tried may either during or *after the trial* reserve any question of law arising either on the trial or in any proceeding preliminary, subsequent or incidental thereto, or arising out of the direction of the Judge for the opinion of the Court of Appeal in manner hereinafter provided."

"(3) Either the prosecutor or the accused may during the trial either orally or in writing apply to the Court to reserve

any such questions as aforesaid, and the Court if it refuses so to reserve it, shall nevertheless take a note of such objection."

What was the object of that provision, sub-sec. 3? The answer will be found in the report of the learned Judges who reported on the English Draft Code from which our Code is so largely taken. I quote from report, p. 38:—

"With regard to matters of law the Judge has at present absolute discretion as to reserving or not reserving questions which arise at the trial and do not appear on the record. This, we think, ought to be modified. We propose accordingly that the Judge shall be bound to take a note of such questions as he may be asked to reserve unless he considers the application frivolous. If he refuses to grant a case for the Court of Appeal the Attorney-General may in his discretion grant leave to the person making the application to move the Court of Appeal and the Court may direct a case to be stated.

"The Court on hearing the case argued may either confirm the ruling appealed from or grant a new trial or direct the accused to be discharged; in a word, it may act in all respects *as in a civil* action when the question is one of law, and that on the application of either side."

Then sec. 744:—

"(2) The Attorney-General or party so applying may, on notice of motion to be given to the accused or prosecutor as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may, upon the motion and upon considering such evidence (if any) as they think fit to require, grant or refuse such leave."

"(3) If leave to appeal is granted, a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved."

"(5) If the Court has arrested judgment and refused to pass any sentence, the prosecutor may without leave make such motion."

Subsection 2 of 743 provides for the Judge reserving questions of law of his own will, whether in the interest of the Crown or the prisoner. Of course it may be suggested by either the Crown or the prisoner. Sub-section 3 and sec. 744 make provision for proceeding against the will of the Judge, namely, for either the Crown or the prisoner applying to have a question reserved, and in case of the Judge's refusal, for either the Crown or the prisoner going to the Court of Appeal for leave to appeal, and if it is granted, a case is to be stated for their opinion just as if a question had been voluntarily reserved by the Judge.

Then there is sec. 746, which applies to the powers of the Court of Appeal dealing with questions of law both where questions have been reserved voluntarily and cases stated in obedience to the Court of Appeal. It provides among other things for directing "a new trial," which is as applicable to the reservation of a case for the Crown as to one for the prisoner.

Section 742 does not apply to the Crown either to enlarge or restrict the right otherwise given to have questions reserved. It is only for a "person if convicted."

Some words have been left out which make the draft Code plainer than this Code to shew that both the Crown and the prisoner have an equal right of having questions of law reviewed. But sec. 743, sub-sec. 2, is in the same words as those of the draft Code and the Judges in their report speaking of the draft Code say, "It must be observed too that the right of appeal on questions of law is given equally to both sides."

In two cases in Ontario learned Courts conceded—not decided, because it was probably never questioned there—that the Crown had the right to have questions of law reviewed: *The Queen v. Williams*, 3 Can. Cr. Cas. 9, where the trial Judge rejected depositions tendered by the Crown on a charge of manslaughter and reserved a case. The case stood over in order that personal notice might be served upon the defendant, the solicitor alone having been served. In *The King v. Burns*, 4 Can. Cr. Cas. 323, there was a motion to the Court of Appeal for

leave to appeal, that is to have a case stated, the police Magistrate who had tried a charge of perjury by consent, having refused to reserve a case. The question turned on whether there was corroborative evidence, it being a case of perjury. None of the Judges decided against the right of the Crown. Armour, C.J., held that the letters relied upon did not in law or in fact corroborate the prosecutor in any material particular implicating the defendant. Osler, J.A., was not satisfied that they did constitute corroboration, but if they did the Magistrate was not bound to convict. And, of course, he was not, as he need not have accepted as true the prosecutor's evidence, and it was not suggested that the letters alone were sufficient, and he reflected upon the case. Moss, J.A., thought there was not sufficient doubt about the Magistrate's decision to justify the granting of an appeal. The other two learned Judges concurred with Osler, J.A. But if there had been any ground for the view that the Crown might not have a law point reviewed, it was just the case for the learned Judges to act upon that view.

Then if I am correct that sub-section 2 applies to both the Crown and the prisoner the only matter to be decided is whether the question reserved by the learned Judge who tried the case was a question of law.

It is very old law that "whether there is any evidence or not is a question for the Judge; whether it is sufficient evidence is a question for the jury." *Company of Carpenters v. Hayward*, Douglas 360 (Buller, J.). The legal sufficiency is a question of law of which the Courts are the exclusive Judges.

The Code, section 11, has a definition of what degree of insanity will constitute an excuse for crime. It is elaborate, and whether or not there is sufficient evidence to go to the jury to make out an excuse under it must surely be a question for the Judge.

Upon this issue of insanity the burden of proof rested upon the defendant. Code sec. 11 (3).

In 1 Greenleaf, sec. 812, note, it is said:

“As a part of the rules regulating the burden of proof the party on whom rests for the time being the duty of coming forward with evidence may be required not merely to offer any evidence whatever, but a sufficient amount to be worth considering before he is regarded as satisfying this rule: in other words, he cannot go to the jury unless his evidence is sufficient by this test; and it is the Judge that applies the test. In this sense then the Judge may be called on to rule whether the evidence is sufficient, *i.e.*, sufficient to go to the jury. If it is they then solely determine whether it is sufficient, *i.e.*, to convince them.”

I also refer to *Metropolitan Railway Co. v. Jackson*, 3 App. Cas. 193, at page 207. Lord Blackburn there cites this from *Ryder v. Wombwell*, L.R. 4 Ex. 32:—

“But there is in every case a preliminary question which is one of law, *viz.*, whether there is any evidence on which the jury could properly find the verdict for the party on whom the onus of proof lies. If there is not the Judge ought to withdraw the question from the jury and direct a non-suit if the onus is on the plaintiff or direct a verdict for the plaintiff if the onus is on the defendant.”

This may be easily accomplished when the only issue is insanity. The Judge would tell the jury that there being no evidence of insanity they could only convict. But when the defendant is setting up another defence as well, and that has to be submitted to the jury, it may lose sight of his direction on the question of insanity. The principle is the same, and, of course, in either case the jury may improperly disregard the direction. In a case of such disregard, if there is any law for a new trial whether for the prisoner or for the Crown, there ought to be a new trial.

The Judge in this case on the present hypothesis properly directed the jury that there was no evidence of insanity. They found that the prisoner was insane. Under sec. 736 of the Code he was, while acquitted of the crime, directed to be kept in strict

custody, etc., and is now confined in the Nova Scotia Hospital. In my opinion the motion to quash the reserved case should be dismissed and the hearing of the reserved case proceeded with to ascertain whether or not there was evidence of insanity sufficient in law for the submission of that question to the jury.

MCDONALD, C.J., concurred with GRAHAM, E.J.

MEAGHER, J. (dissenting), was of opinion that the Crown case reserved ought to be quashed.

Motion to quash case dismissed.

Note: *Reserving case on Crown's application.*

See the next following case, *The King v. Karn*, decided by the Court of Appeal of Ontario.

The judgment of the Supreme Court of Nova Scotia on the case reserved will be reported in due course as *R. v. Phinney* (No. 2).

[COURT OF APPEAL FOR ONTARIO.]

BEFORE MOSS, C.J.O., AND OSLER, MACLENNAN, GARROW AND
MACLAREN, JJ.A.

THE KING v. KARN.

Reserved case on Crown's application—Discretion to refuse new trial notwithstanding error below—Erroneous direction not resulting in mis-trial—Cases in which reserved case should be refused to the prosecution—Placing accused twice in jeopardy—Drugs for procuring miscarriage—Unlawful advertisement—Proof of intent—When interpretation a question for the jury—Cr. Code secs. 179, 743, 744.

1. Where a verdict of not guilty is returned by the judge's direction after the evidence is heard, and a reserved case is taken to the Court of Appeal at the instance of the Crown upon the ground that the direction was erroneous and that it was for the jury and not for the judge to say whether a certain printed advertisement disclosed an unlawful intent, the Court of Appeal may decline to order a new trial although it upholds the objection that such direction was erroneous.
2. Notwithstanding the power to order a new trial upon a case reserved at the instance of the Crown, the accused should not ordinarily be put in jeopardy a second time for the same offence merely because his acquittal was due to an erroneous direction not resulting in a mis-trial.

3. Per OSLER, J.A.—Where there has been an acquittal, the preferable practice is for the trial judge to refuse to reserve a case upon the application of the prosecutor complaining of an erroneous direction, and for the prosecutor to apply to the Court of Appeal under Code sec. 744 for leave to appeal.
4. Upon a charge under Code sec. 179 (c) of knowingly, and without lawful excuse or justification, advertising a drug intended or represented as a means of causing abortion, the trial judge may withdraw the case from the jury if the advertisement is incapable of such meaning, but if it be held to be capable it is then for the jury to decide whether or not it actually had such meaning having regard to the context of the objectionable words and to the circumstances of the case.

The King v. Karn, 5 Can. Cr. Cas. 543, reversed.

ARGUED: December 12, 1902.

DECIDED: April 14, 1903.

The defendant was indicted under sec. 179 (c) of the Criminal Code, which is as follows: "Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful excuse or justification, offers to sell, advertises, publishes an advertisement of or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion."

The defendant was acquitted by the direction of His Honor Judge McDougall, Senior County Judge at Toronto, presiding at the Court of General Sessions, the learned judge ruling that there was no evidence that the drug was "intended or represented" by the accused as a means of preventing conception or causing abortion.

A case was reserved, at the instance of the Crown, upon the question whether the evidence would support a conviction and should have been left to the jury under the circumstances mentioned in the judgment.

TORONTO, December 12, 1902.

J. R. Cartwright, K.C., for the Crown.

E. E. A. DuVernet, for the defendant.

TORONTO, April 14, 1903.

OSLER, J.A.:—The accused was indicted at the general

sessions of the peace for the county of York, for that he did in the month of November, 1901, unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale, a certain medicine, drug, or article, described, intended, or represented as a means of preventing conception, or causing abortion or miscarriage, and did thereby commit an indictable offence contrary to the Criminal Code, sec. 179 (c).

The trial took place on the 9th December, 1901, before the chairman of the general sessions of the peace and a jury.

The evidence for the Crown shewed that the accused conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the accused and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets, and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved.

On behalf of the Crown it was contended that the statement on the box and in both the circulars referred to, or some part of the same, or some expressions therein, shewed that the drug or article was thereby intended or represented as a means of preventing conception or causing abortion; and, therefore, that the accused, having offered to sell or having the article for sale or disposal, had committed an offence within the meaning of sec. 179 (c) of the Criminal Code, which enacts so, and it was urged that the case should be left to the jury to draw their own conclusions from the language of the printed notices, directions, and circulars proved.

The learned chairman of the sessions (McDougall, Co. J.) was of opinion, though with some doubt, that, looking at the whole advertisement, it was not one advertising a medicine for preventing conception or causing abortion, and he directed an acquittal, reserving a case for the Crown, if desired, upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned.

There was no evidence for the prosecution, except that which I have mentioned; and the question simply was, whether the advertisement was one of a medicine *intended* or *represented* as a means of preventing conception, etc. If that meaning could not be drawn from the circular, the notice, and printed directions, the case for the prosecution necessarily failed, as there was no extraneous evidence to give point to the language of the printed papers, and to shew that the medicine had been sold for the purpose said to be intended or represented. The section is new, and there is no corresponding section that I am aware of in any Imperial Act,

The defendant contends that the construction of the printed documents was wholly for the Judge. For the prosecution it is argued that it was wholly for the jury. I do not agree with either contention.

There is some analogy between a case of this kind and an indictment for sending a threatening letter, or for a libel. In Taylor on Evidence, 9th ed., sec. 43, it is said: "The respective duties of the Judge and jury on indictments for writing threatening letters are not very clearly defined. In some cases the jury have been permitted, upon examination of the paper, to decide for themselves whether or not it contained a menace. In other cases, the question appears to have been exclusively determined by the Court; while on a few occasions the opinion of the jury, and of the Judge, have been both alternately taken." Many authorities are cited. The result of the most recent and consistent is, that the jurisdiction of the Judge is to determine whether the document is capable of bearing the meaning assigned to it, and it is then for the jury to say

whether under the circumstances it has that meaning or not: per Lord Morris, C.J., in *Regina v. Coady* (1882), 15 Cox C.C. 89; *Regina v. Carruthers* (1844), 1 Cox C.C. 138.

It is not contrary to law to sell, or advertise for sale, the drug or medicine in question. The Act strikes at the abuse, not the use of it, which may be perfectly legitimate. From the nature of its action, however, it is a drug extremely susceptible of being used for an improper purpose, or at a period when it might produce a result which ought not to be sought for; and it cannot, therefore, be wrong to warn against its use for such purposes, or at such a period. In the absence of evidence that the warning on the outside of the box was intended to be read as an invitation to do the very thing warned against, in other words, that it was not an honest warning, I should have thought the learned chairman of the sessions was right in saying that the jury would not be justified in inferring from the warning alone that the drug was intended or represented as a means of preventing conception or causing abortion. There is, however, a paragraph in the "directions" which is of a more doubtful character, viz.: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets." I think the learned chairman should have held that this language, read of course with the rest of the printed matter, was capable of the obnoxious meaning, and that the jury could have legitimately inferred from it that the tablets were thereby represented, at least, as a means of preventing conception. Their object and operation in promoting and ensuring the regularity of the menstrual flow, which is, popularly at all events, supposed to be interrupted by conception, is so clearly and explicitly stated, that it might well be asked for what other purpose married ladies, or others who might desire to prevent pregnancy, would be likely to be using them monthly. I think, therefore, it would have been right to have left the case to the jury; and that, if they had taken an

unfavourable view of the meaning of the paragraph referred to, a conviction might have been supported.

This expression of opinion will probably be sufficient as a guide in future cases of a similar kind, as we are not obliged, nor do I think it would be right even if we have the power to do so, to direct a new trial, the defendant having been tried and actually acquitted, though, it may be, in consequence of an erroneous direction. The cases ought to be extremely rare in which the Court would think it right to place the accused a second time in jeopardy for the same offence, contrary to what has hitherto been one of the fundamental principles of English law.

I express no opinion on this point at present, but it is not to be overlooked, that what the section of the Code speaks of in reference to a new trial on an appeal by the prosecutor, is where there has been a *mistrial* in consequence of an erroneous ruling of the Judge. I must say, speaking for myself, that where there has been an acquittal it would be more desirable for the trial Judge to leave the prosecutor to apply for leave to appeal, than to reserve a case. Very different considerations, of course, prevail where there has been a conviction after an erroneous ruling on some important point adverse to the accused.

MACLAREN, J.A.:—The accused was indicted at the general sessions for the county of York, under sec. 179 (c) of the Criminal Code, for offering to sell and advertising for sale a certain medicine called "Friar's French Female Regulator," intended or represented as a means of preventing conception or causing abortion or miscarriage. The label and advertisements were proved, and are made a part of the reserved case.

Some of the expressions relied upon by the Crown as bringing these advertisements within the statute are: "They will speedily restore the menstrual secretions when all other remedies fail." "Should this function become deranged from any cause whatever, relief can always be obtained by using the tablets." "The only certain and effectual emmenagogue

known." "These tablets surpass all such compounds as penny-royal, ergot, tansy, etc." "Thousands of married ladies are using these tablets monthly." "No name is ever divulged, and your private affairs, your health, are sacred to us." "Do not use the regulator during pregnancy."

The learned chairman of the sessions stated that he had some doubt whether the advertisement was an offence against the statute, and thought he ought to give the accused the benefit, and consequently withdrew the case from the jury.

If the language used could not properly bear the construction sought to be placed upon it by the Crown, then the case should have been withdrawn from the jury, there being no evidence to submit to them. But the learned chairman did not so hold, and did not place the withdrawal upon this ground. Some of the expressions objected to would appear to be clearly susceptible of such an interpretation, if indeed it might not be said that such was their ordinary and natural meaning, and I think it should have been left to the jury to say, whether, under all the circumstances of the case, taking into account not only the language itself, but also the context, the repetition of certain words and phrases, and the prominence given to them by special type or otherwise, the advertisement in question did or did not actually bear the meaning charged in the indictment. If they came to the conclusion that it did, they would then have to inquire further whether, in the language of the section above referred to, the public good was served by the act complained of, or whether there was any excess beyond what the public good required, or whether it was without lawful justification or excuse.

The respective functions of the Judge and the jury in a case like the present would appear to be very much like those in cases of threatening letters or obscene libels: see *Rex v. Girdwood* (1776), 1 Leach C. C. 142; *Rex v. Robinson* (1796), 2, Leach C. C. 749; *Rex v. Tyler* (1835), 1 Mood. C. C. 428; *Regina v. Carruthers*, 1 Cox C. C. 138; *Regina v. Smith* (1849), 1 Den. C. C. 510.

I am of opinion that the case should not have been withdrawn from the jury.

MOSS, C.J.O., MACLENNAN and GARROW, J.J.A., concurred.

No order.

Note: Reserving case on Crown's application.

See the preceding case, *The King v. Phinney* (No. 1).

[COURT OF KING'S BENCH, QUEBEC.]

[CROWN SIDE.]

BEFORE WURTELE, J.

THE KING v. CHARLIER.

Contempt of court—Newspaper comment—Newspaper proprietor commenting on prosecution of indictment against himself—"Pending cause"—Requiring security to refrain from further newspaper comment until case ended.—Crim. Code, secs. 14, 290.

1. Where the jury disagreed upon the trial of an indictment and a new jury was ordered for another sittings the cause is meanwhile still a pending one and improper and impartial comments thereon published by one of the accused will constitute a contempt of court by him.
2. The court imposing sentence upon a newspaper proprietor for a contempt of court contained in newspaper comment may, in addition to the infliction of a fine and imprisonment, require the accused to find sureties to keep the peace and to refrain from publishing further articles reflecting on the pending cause, and may order imprisonment for six months, or until security is sooner given, or until the pending cause is sooner ended.

MONTREAL, April 6, 1903.

WURTELE, J.:—Edouard Charlier and Guillaume Wilhems were charged with having conspired together to extort money from the Metropolitan Insurance Company by offering to abstain from publishing defamatory libels against it in a newspaper called "Les Débats," which is published at Montreal, and of which Edouard Charlier is the editor and manager, and they were indicted on that charge. They were tried on the indictment so found against them, and the trial lasted from the 6th to the 16th of March last; the jury were unable to agree upon a verdict

and were discharged by the Court, and it was at the same time directed that a new jury should be impanelled during the sittings of the present term to try the case. The cause is therefore now pending, and it has been constantly pending since the indictment was found against the defendants and was returned into Court and filed of record.

The defendant Edouard Charlier published three articles concerning the cause in the number of the newspaper "Les Débats," which was issued on Sunday, the 22nd March last, entitled "Notre Procès," "Reconnaissance," and "Les Procédés de la Métropolitaine," and he also published two other articles concerning the cause in the number of the same newspaper which was issued on the following Sunday, being the 29th day of March last, entitled "Quelques Explications," and "Les Procédés de la Métropolitaine." It was represented to the Court that the publication of these articles constituted a contempt of Court on the part of Edouard Charlier, and a copy of each of the issues of the newspaper in which they were published and an affidavit were produced and filed of record and a rule was thereupon issued and served upon him to show cause why he should not be held in contempt and punished accordingly. On the return of the rule, on the 3rd day of April instant, the contemnor Edouard Charlier appeared and stated that he had published the articles in good faith and was ignorant of the fact that the law prohibited the publication of such writings while the cause to which they refer is pending; and he added that if he had in good faith committed a contempt of Court, he desired to apologize.

Contempts of Court are classified as either direct or indirect. The first is a contempt in the presence of the Court or so near to it as to interrupt its proceedings, and generally consists in noisy and disrespectful behavior and improper conduct, or in open defiance of the powers and authority of the Court; and the other is one offered elsewhere than in the presence of the Court, and which tends by its effect and operation to impede in pending causes the due administration of justice, to excite prejudice against the parties and their litigation while it pends and to in-

fluence the Judge and the persons who may become jurors as to the merits of a pending cause. Comments on a cause written and published, or spoken while it pends, and of a nature to prejudice or calculated to prejudice any of the parties, constitute an indirect contempt of Court.

To state or insinuate at a public meeting or elsewhere publicly that the defendant is not guilty, coupled with the affirmation that there was a conspiracy against him and that he could not or would not have a fair trial, is a gross contempt of Court. All Courts of record have a right to punish contempt of Court; in the case of a direct contempt, the Court may act on view in a summary manner and punish instantly, and when the Judge has not seen the act constituting a contempt—which has been done in close proximity to the Court and which has disturbed the proceedings, it may proceed and punish in a summary way, but proof identifying the disturber must be made, unless the act is admitted. In the case of an indirect contempt, the contemnor must be regularly summoned to show cause and unless it is admitted by the contemnor, proof of the act constituting the contempt must be given to the satisfaction of the Court.

The question whether a contempt has been committed is for the sole decision of the Court, and the fact of the contemnor denying any disrespectful or contemptuous design of reflecting on proceedings pending before the Court and tending to prejudice the public in the matter of a pending litigation, will not justify the contemnor if such comments and remarks appear to the Court to amount to a flagrant contempt.

And then ignorance of the law is no excuse. To use the words of section 14 of the Criminal Code: The fact that an offender is ignorant of the law is not an excuse for any offence committed by him. But when a contemnor who has made comments and remarks reflecting upon an impending cause makes a humble apology to the Court, and expresses his regret and contrition unreservedly, sometimes the rule is discharged upon the payment of costs as between solicitor and client on the proceedings for the contempt as a penalty, and upon the undertaking

that until the end of the trial there would be no more public comments or remarks of a nature or tendency to prejudice the course of justice, but this is only done, however, when the contempt is not of a gross nature.

The publication in newspapers of articles or of items or paragraphs containing comments and remarks, or of other matter referring to a pending cause and of a nature tending to prejudice the public and especially persons likely to be jurors, as to its merits, and thus to interfere with the due administration of justice, has always been regarded as a contempt of Court, and really constitutes one; and in this connection I may say that jurors may be considered more amenable than Judges to the influence of comments upon pending proceedings. The editor, printer or publisher of a newspaper is held liable for the contempt which arises from the publication of comments upon a pending cause, and it is a graver offence for one of the parties to comment on a pending cause, than for strangers who have no interest in it to do so. Mr. Justice Wills once stated that there was a great and mischievous tendency to publish articles calculated to prejudice a fair trial, and that, if it went on, it would lead to trial by newspapers instead of by the proper tribunals of the country. Proceedings are pending in a criminal case from the time the information is laid, and so long as any proceedings can be taken, and when a jury are unable to agree and it has been ordered that a new jury be impanelled to try the case, proceedings can be taken; and the case has been pending from its inception and is pending during the space of time between the two trials and afterwards until the cause is ended by a verdict or otherwise. During a pendency of a cause comments on the proceedings constitute and are contempts; but when a cause has ended, comments may be made, and are not contempts of Court.

In some cases, the act complained of may be indictable or may be punishable in some other manner, but this fact does not deprive the Court of the essential power to punish it as contempt.

Criticism or comment on a cause which is over is not a contempt of Court; such criticism and comment may, if the language is unguarded, contain a libel, but it is not a case to be dealt with as contempt. And there is no objection to a fair, accurate and impartial report of the proceedings at a trial and of the evidence adduced, and the publication of such a fair, accurate and impartial report or of the result of a case, is not a contempt of Court, but any report of the proceedings or evidence in a case during its pendency must not be accompanied with comment, as if it does, it may be held to constitute a contempt.

Whether or not a person should be punished for the publication of matter tending to prejudice a pending cause is entirely within the discretion of the Court, and is not subject to revision or appeal.

I have carefully read and considered the articles mentioned and specified in the application and in the rule and published in the numbers of the newspaper "Les Débats," of which the contemnor is the editor and manager, issued on Sunday, the 22nd March last, and on Sunday, the 29th March last, and applying the facts to the principles which I have enunciated, I find that the comments and the remarks contained in them and written by the editor and manager, Edouard Charlier, and which refer to a cause which was then and is now pending, wherein he is one of the accused, constitute a flagrant contempt, and I am therefore constrained to declare him to have been when the articles were published, and to be now, in contempt of Court.

I much regret that when the contemnor gave his explanation he did not unreservedly express his regret and contrition for the wilful publication of the articles, as in such case I might have discharged the rule upon the payment of costs and the giving of security to be of good behaviour and to refrain from publishing any further contempts with reference to the case against himself and Guillaume Wilhems during its pendency. Edouard Charlier is a man of excellent education and of great intelligence and he cannot but have known the nature of the articles which are mentioned and specified in the rule and which he wrote and

published, and also the effect of their publication. Then his explanation and declaration should have been made under oath administered in Court or have been made by affidavit. I cannot accept under the circumstances his plea of ignorance of the law, and I cannot accept his explanation and declaration as a proper and full apology of a nature to purge his contempt and mitigate his offence. I will have, therefore, to impose, in addition to the payments of costs and the giving of security, an imprisonment to show the gravity of publications such as those made by him and to warn him and others who might err as he has done to refrain from acts of the same nature.

The sentence which I am about to render has no reference whatever to the charge contained in the indictment found against him and Guillaume Wilhems, and is a punishment solely for the contempt of Court committed by him and it has no reference either to any other articles which he may have published.

I hold Edouard Charlier to have been, when he published the articles complained about, and to be now, in contempt of Court, and for such contempt I adjudge that he be imprisoned in the common jail of this district for and during the term of one day; that he do pay to the Clerk of the Crown for this district the sum of \$25 for costs on the proceedings against him for contempt, as a penalty, to be paid by such Clerk of the Crown to the Treasurer of the Province of Quebec, for the public uses of the Province, which is charged with and bears the expenses of the administration of the Criminal Law, and that in default of the payment of such sum of \$25 within fifteen days the same shall be levied by distress and the sale of the goods and chattels of the contemnor Edouard Charlier, and that he do give security, himself in the sum of \$1,000, with two sureties jointly and severally in the same amount, to keep the peace and to be of good behaviour and not commit any contempt with reference to the cause now pending before the Court of King's Bench on its Crown side in the District of Montreal, wherein Edouard Charlier and Guillaume Wilhems are the accused, and until after the trial to make no attempt to prejudice the due course of justice by publishing

articles and consequently to refrain from publishing in the newspaper "Les Débats," or in any other newspaper, or in any pamphlet, any comments reflecting on such pending cause or any comments respecting the Metropolitan Insurance Company or its officers, in connection with such pending cause during the pendency of the same, and further to stop the sale of the numbers of the newspaper "Les Débats," issued on Sunday, the 22nd March last, and on Sunday, the 29th March last, also during the pendency of the cause in question, and that in default of giving such security within two days before the Clerk of the Crown for the District of Montreal, the contemnor Edouard Charlier be imprisoned for six months in the common jail of this district or until such security is sooner given, or until the cause in question which is now pending is sooner ended.

Order accordingly.

Note: *Contempt of Court—Newspaper comment.*

See note on this subject in Vol. V. Can. Crim. Cas., at page 110, and see *Stoddart v. Prentice*, 5 Can. Cr. Cas. 103, decided by Drake, J. of the Supreme Court of British Columbia.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, J., TOWNSHEND, J., GRAHAM,
E.J., AND MEAGHER, J.

THE KING v. CHISHOLM.

Witness fees—Provincial criminal law—Statute fixing per diem rate—Time and manner of payment—Fine for non-attendance where fee not prepaid—Conviction set aside—Nova Scotia Liquor License Act, 1900, s. 161—R.S.N.S. c. 100.

1. A witness subpoenaed to attend before justices under a provincial law which specifies a per diem witness fee but makes no provision as to the time or manner of payment, is not liable to fine for refusing or neglecting to attend under the subpoena unless he had been prepaid his witness fee.

ARGUED: December 15, 1902.

DECIDED: January 17, 1903.

The following was a case stated for the opinion of the Court:—

1. The defendant was summoned to appear as a witness, on behalf of the prosecution, at the trial of an action between the King and one Jane Perro, a prosecution under "The Liquor License Act" of Nova Scotia, Revised Statutes of Nova Scotia, 1900, ch. 100, held before F. H. McPhie and D. McDonald, Esquires, Justices of the Peace in and for the County of Antigonish, on the 21st day of May, 1902.

2. No fees or expenses for travel or attendance were paid or tendered to defendant when served with the summons to appear as a witness in said action, nor at any other time.

3. Defendant did not appear as a witness at the trial of said action on the said 21st day of May, 1902.

4. Notwithstanding defendant's non-appearance said Justices of the Peace proceeded with the trial of said action, and, after hearing several other witnesses for the prosecution, convicted the said Jane Perro of a violation of the said Liquor License Act.

5. Afterwards, on the 16th day of June last past, at the instance of the prosecutor in said case, the Inspector of Licenses for the said County of Antigonish, a summons was issued by one of said Justices, F. H. McPhie, Esquire, requiring the defendant to appear before him on June 23rd, 1902, to answer to the charge of refusing or neglecting to attend as a witness on the 21st day of May, 1902, in the said case of *The King v. Jane Perro*.

6. On the said 23rd day of June the defendant appeared by his solicitor, before the said Justice, who had then associated with him D. McDonald, Esq., a Justice of the Peace in and for the County of Antigonish. Said solicitor objected to the information herein on the ground that it did not allege that defendant was a material witness, or was deemed to be a material witness, in the former case of *The King v. Jane Perro*.

7. After hearing evidence in support of the charge herein, the said Justices of the Peace convicted the defendant, and imposed a fine of five dollars (\$5) and costs (\$2.85).

8. It is not alleged in said conviction that the defendant was a material witness, or was deemed to be a material witness, in the former case of *The King v. Jane Perro*.

9. It is not alleged in either the information or the summons herein that defendant was a material witness, or was deemed to be a material witness, in the said case of *The King v. Jane Perro*.

10. Herewith attached marked "F. H. M. 1," "F. H. M. 2," "F. H. M. 3," "F. H. M. 4," are true copies of the information, summons, minute of conviction, and conviction respectively herein.

11. Defendant was convicted herein on June 24th last past, and, on the 30th day of said June, application in writing was made by him to said F. H. McPhie and D. McDonald, Justices of the Peace to state and sign a case for the Supreme Court or a Judge thereof, in accordance with sec. 73, ch. 161, Revised Statutes of Nova Scotia, 1900, "The Nova Scotia Summary

Convictions Act." At the time of making said application the defendant entered into and delivered to said Justices of the Peace a recognizance as required by sec. 73, sub-sec. 3 of said Act, and the same was approved and accepted by said Justices.

The questions submitted are:—

1. Whether defendant should have been convicted by said Justices of the Peace, and punished for refusing or neglecting to attend as a witness in the former case of *The King v. Jane Perro*, when his fees or expenses for travel and attendance had neither been paid nor tendered him.

2. Whether the conviction herein is defective and bad for not stating that defendant was a material witness, or deemed to be a material witness, in the former case of *The King v. Perro*.

3. Whether it should not have been alleged in the information herein that defendant was a material witness, or was deemed to be a material witness, in said case of *The King v. Perro*.

4. Whether said Justices of the Peace exceeded their jurisdiction in convicting defendant of the offence charged in the information herein.

5. Whether the conviction of the defendant for the offences charged in the information herein is erroneous in point of law.

HALIFAX, December 15, 1902.

D. C. Chisholm and *C. E. Gregory*, for defendant:—The rule that witnesses in criminal matters are bound to attend without payment of fees only applies to indictable offences: R.S.N.S., ch. 186, secs. 4 and 8; Phipson on Evidence, 408; 5 Exch. 956; R.S.N.S., 1900, ch. 100, secs. 46, 47, 48; *Ex parte Anderson* (1898), 34 Can. Law Jour. 392; Chitty's Crim. Law, 612; Clarke's Mag. Man., 4th ed., 96. It must appear that the witness was material: R.S.N.S., ch. 100, sec. 161; Paley on Convictions, pp. 29, 186. As to costs, Russell on Crimes, 98; *The King v. Bennett*, 5 Can. Crim. Cas., 456.

R. R. Griffin, for the prosecutor:—R.S.N.S., 1900, ch. 100, sec. 161. There is no provision for witness fees in this chapter: *Ib.*, ch. 163, sec. 40. The word "action" is defined in R.S.N.S., 1900, ch. 155, sec. 2, sub-sec. 4; ch. 1, sec. 25. The municipality is liable for witness fees: R.S.N.S., ch. 100, sec. 167; Roscoe's *Crim. Evidence*, 12th ed., 98; Greenleaf on *Evidence*, sec. 311; Russell on *Crimes*, vol. 1, p. 90; vol. 3, p. 640; Short and Mellor's *Crown Office Prac.*, 453; Crankshaw's *Magistrate's Guide*, 193; *King v. James*, 1 C. & P. 122. The allegation that defendant was a material witness is immaterial: R.S.N.S., 1900, ch. 100, sec. 161; Seager's *Magistrate's Manual*, 303; Maxwell on *Stats.*, 367.

D. C. Chisholm, in reply, referred to Taylor on *Evidence*, vol. 2, p. 1060.

HALIFAX, January 17, 1903.

GRAHAM, E.J.:—The principal question reserved by the justices in this case is whether the defendant, who was subpoenaed as a witness under the Liquor License Act, R.S. ch. 100, is liable to a penalty for disobedience in not attending under sec. 161 in a case in which he was not paid or tendered witness fees.

By R.S.N.S., ch. 185, sec. 1, fees and allowances for persons in respect to the services mentioned in the schedule, shall be as therein prescribed, and shall be regulated by the provisions in such schedule.

Turning to the schedule for the Supreme Court, we find, under "witness fees": "For attendance, per day, \$0.50." "Travel, per mile, coming and going, .05." And, under "Fees to be taken under the Liquor License Act," we have "(3) witness fees. The same as in the Supreme Court."

So that it is evident that, at some time or another, the witness is entitled to be paid for his attendance, and for mileage.

The only question is whether he can require prepayment, or is obliged to perform the service and recover it afterwards, presumably, by action.

By ch. 186 elaborate provision is made for the payment by the municipality of witness fees, at least on the part of the Crown, in the case of an indictable offence, both before the Justices, and, afterwards, in the Supreme Court, or County Court. They are paid upon a certificate of the prosecuting officer, by the treasurer of the Municipality, and, of course, after the witness has attended.

In England some such provision exists, but it applies only to felonies and certain misdemeanours. And this is said in 1 Chitty on Criminal Law, p. 613:

“But none of the Acts of Parliament, allowing compensation in criminal cases, extend to prosecution for misdemeanours; and in these cases, therefore, the Judge has no power to grant the witness's petition; and the parties desiring the attendance of the witnesses must take care and tender sufficient to cover their reasonable expenses, or the Court will not punish the witness for his non-attendance.”

And, in Dickenson's Guide to the Sessions, p. 86, it is said:

“The compensation, however, provided by statute for the attendance of witnesses in cases of misdemeanour is limited to the cases enumerated in the recent act, which will be considered hereafter, and therefore, in criminal prosecutions for other misdemeanours, it behoves the prosecutor, in order to secure the attendance of his witnesses, to tender them sufficient to cover all reasonable expenses.”

It appears that, in civil cases, the Court would not attach a witness for contempt in not attending unless his fees had been prepaid: *Bowles v. Johnson*, 1 W. Bl. 36; *Fuller v. Prentice*, 1 H. Bl. 49; and it must be remembered that while the prepayment of witness fees, in order to ground other remedies

against the witness, was necessary under 5 Eliz., ch. 9, in civil cases, that statute did not provide for the attachment of witnesses and prepayment of fees in order to have that remedy.

There is nothing in the statute which implies that a witness is to give credit for his fees. His remedy is not ample unless he requires prepayment before attendance, in analogy to the practice prevailing in civil cases since 5 Eliz., ch. 9. In most cases the fees are so small that an action would be out of the question. The costs are awarded to the informant in a conviction and not to the Justices in ordinary cases: *Rex. v. Roche*, 4 Can. Crim. Cases, 64. A witness has no better mark than the informant if he does not require prepayment. To require to be paid as the services are performed is not an unusual mode of enforcing the payment of fees: *Markwell v. Dyson*, 14 Q.B. 824; 19 Am. & Eng. Ency. Law, 1st ed., 538. In case of a witness that remedy would not result in serious inconvenience as that is the practise in civil cases, to which these summary prosecutions bear a strong resemblance.

If the Court in England would not attach a witness for contempt unless the fees were tendered to him when he was served with the subpoena, I am of opinion that a witness under the Liquor License Act should not be made liable for the penalty until proof is made that the proper fees were tendered to him before he was required to give evidence.

The conviction should be quashed, and with costs.

MCDONALD, C.J., and RITCHIE, TOWNSHEND and MEAGHER, JJ., concurred.

Conviction quashed.

[HIGH COURT OF JUSTICE, ONTARIO].

BEFORE FALCONBRIDGE, C.J.K.B., STREET, J., AND BRITTON, J.,
SITTING AS A DIVISIONAL COURT.

THE KING v. LEWIS.

Jurisdiction of magistrate—Statute requiring sworn information—Amended information not re-sworn—Waiver by accused—Failure to object—Record of conviction—Omission to state time and place of offence—Reference to depositions on certiorari—Master and Servant Act (Ont.)—1 Edw. VII. (Ont.), c. 12, s. 14—1 Edw. VII. (Ont.), c. 13, s. 1—2 Edw. VII. (Ont.), c. 12, s. 15—Crim. Code, s. 889.

1. Where the accused was brought before a justice to answer a charge under an Ontario statute which requires an information on oath, and the justice thereupon amended the sworn information in the presence of the informant and gave notice to the accused that he would be tried on the amended information, the fact that the information had not been re-sworn after the amendment will not invalidate the proceedings if no objection was then taken by the accused.
2. Where a perusal of the depositions returned on certiorari satisfies the court that an offence was committed as stated in the conviction and of the date and place of same which had not been stated in the conviction, the irregularity in not stating such date and place is cured by Code section 889 unless an excessive punishment has been imposed by the magistrate.

ARGUED : February 9, 1903.

DECIDED : April 4, 1903.

THIS was a motion to make absolute a rule *nisi* to quash a conviction of the defendant, William Lewis, by H. S. Broughton, J.P., on 2nd August, 1902, for that the said William Lewis having entered into an agreement with one Frederick Stoddart to perform work and services for the said Stoddart at the village of Bradford, under which he, the said William Lewis, received from the said Frederick Stoddart, as an advance of wages, the sum of one dollar and thirty cents in a railway ticket for his transportation from Toronto to the village of Bradford, did, without the consent of said Stoddart, leave the employ of said Stoddart before the cost of such transportation had been repaid, contrary to the provisions of the Act respecting Master and Servant, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII., ch. 12, sec. 14 (O.).

The grounds upon which the conviction was sought to be quashed were the following:—

1. That the information disclosed no offence.
2. That the defendant was arrested under a warrant charging him with obtaining money under false pretences, and that he was tried and convicted by the justice of that offence without jurisdiction.
3. That the information was not amended before the trial, but, if so amended, it was not re-sworn, and the magistrate had no jurisdiction to hear and determine any question under the Master and Servant Act without an information on oath.
4. That the evidence disclosed no offence.
5. That the prisoner was not permitted to make full defence before the magistrate.

The following objections were also made to the form of the conviction:—

- (1) That it is stated to be for a penalty to be levied by distress, and no provision is made in the body of the conviction for levying distress before imprisonment.
- (2) That the date of the offence is not set out.
- (3) That the costs of conveying the prisoner to gaol are not included.
- (4) That there is no power under the Master and Servant Act to award imprisonment forthwith in default of payment of fine and costs.
- (8) No minute of conviction was made.
- (9) The amended information was not read to the defendant, and he was not aware that he was being tried upon it.

TORONTO, February, 9, 1903.

S. B. Woods, for the motion. Section 9 of R.S.O. 1897, ch. 157, requires complaints to be made on oath, and the information not having been re-sworn, the justice of the peace had no jurisdiction: *In re Conklin* (1871), 31 U.C.R. 160; *The Queen v. McNutt* (1896), 3 Can. Cr. Cas. 184; *Dixon v. Wells* (1890), 25 Q.B.D. 249, at p. 257; *Blake v. Beech* (1876), 1 Ex. D. 320, at

p. 330. The conviction was for a different offence than the one charged, and the sections of the Criminal Code as to variance have no application: *Martin v. Pridgeon* (1859), 1 E. & E. 778; *The Queen v. Brickhall* (1864), 33 L. J.M.C. 157. The conviction is bad in not shewing that the complaint was made under oath. The defendant did not waive the irregularities by proceeding with the trial, as he was not represented by counsel, and did not know his rights. He could not waive a right he did not know he had: *The Queen v. Cockshott*, [1898] 1 Q. B. 582, at p. 586. The conviction is bad in stating it to be for a penalty to be levied by distress, whereas no distress is mentioned in the body of it, and the heading is part of the conviction. The defendant was actually convicted of obtaining money under false pretences, and the information was amended subsequent to the conviction.

James Bicknell, K.C., for the prosecutor. The reference to the crime of false pretences is surplusage. In any event, the information as amended was read over to the defendant before the trial, and the trial proceeded without objection or protest on his part. This conduct waived any objection to the information. The evidence disclosed an offence under the Master and Servant Act, R.S.O. 1897, ch. 157, as amended by sec. 14 of 1 Edw. VII., ch. 12, and the Court will amend all technical irregularities: Criminal Code, secs. 845, 846, 847, 889, and 890. In any event, no costs should be given to the appellant: *Rex v. Bennett* (1902), 4 O.L.R. 205; *The Queen v. Cockshott*, [1898] 1 Q.B. at p. 586.

A. E. Scanlon, appeared for the magistrate.

TORONTO, April 4, 1903.

The judgment of the Court was delivered by

STREET, J.:—The affidavits filed upon the motion are in several respects contradictory, but the following appear to me to be the true facts of the case.

The prosecutor Stoddart hired the prisoner and some others in Toronto to come to Bradford to work for him, and as they

said they had no money to pay their railway fares to Bradford, he bought tickets for them at their request, and handed the tickets to the conductor for them.

After their arrival they worked for him for a few hours, not sufficient to repay him for his outlay, and then refused to do any more work, and left his employ.

He went to the magistrate, Broughton, and swore to an information that "William Lewis did on the 28th of July accept the sum of \$1.30 to pay his fare to Bradford on the condition that said amount was to be worked out, and that the said William Lewis refused to work after reaching this place, with the exception of four hours and thirty minutes."

The magistrate thereupon issued a warrant to arrest the prisoner: in the warrant the facts stated in the information are substantially set forth, but with the addition at the end of the words "consequently obtaining money under false pretences."

The prisoner was arrested and brought before the magistrate on Saturday evening, 2nd August, 1902, at 8.30 p.m.

The magistrate, in the presence of the prosecutor, amended the information by adding at the end the words "as per section 14 (5a) Master and Servants Act, Ontario Statutes, 1901," but the information as amended was not re-sworn.

The amended information was then read over to the prisoner, and he was informed that he was to be tried under it as amended. He made no application for adjournment, nor objection to the trial proceeding.

The prosecutor gave evidence, and then the prisoner was sworn and gave evidence on his own behalf, and the magistrate then adjudged that the prisoner should be fined \$5 and \$4.88 for costs, and that if the amounts be not paid forthwith he should be committed to the common gaol at Barrie for ten days, and a note of this conviction was made by the magistrate at the foot of the proceedings, and a formal conviction was drawn up afterwards.

The prisoner, after remaining in custody for about an hour

gave security for payment of the amount, and was released. The conviction so drawn up is as follows:—

“Conviction for a penalty to be levied by distress, etc.

“Canada.

“Province of Ontario,

“County of Simcoe.

“To wit:

“Be it remembered that on the second day of August, in the year A.D. 1902, at Bradford, in the said county, William Lewis is convicted before the undersigned H. S. Broughton, a justice of the peace for the said county, for that the said William Lewis having entered into an agreement with one Fred. Stoddart to perform work and services for the said Stoddart at the village of Bradford, under which he, the said William Lewis, received from the said Stoddart as an advance of wages the sum of \$1.30 in a railway ticket for his transportation from Toronto to the village of Bradford, did without the consent of said Stoddart, leave his employ before the cost of such transportation had been repaid, contrary to the provisions of the Act respecting Master and Servants, R.S.O. 1897, ch. 157, as amended by 1 Edw. VII., ch. 12, sec. 14.

“And I adjudge the said William Lewis for his said offence to forfeit and pay the sum of five dollars to be paid and applied according to law, and also to pay to the said Fred. Stoddart the sum of \$4.88 for his costs in this behalf, and if the said several sums are not paid forthwith, I adjudge the said William Lewis to be imprisoned in the common gaol of the said county at Barrie, in the said county of Simcoe, for the term of ten days unless the said several sums are sooner paid. Given under my hand and seal the day and year first above mentioned at Bradford, in the county aforesaid.

Sgd. H. S. Broughton, (Seal)”
J.P., Co. Simcoe.

I think the nature of the offence intended to be charged against the defendant was sufficiently clear in the original information, and any doubt is removed by the addition to it of

the reference to the Act. It is true the information with the amendment was not re-sworn, but it was read over to him, and the trial proceeded without any protest or objection on his part, and he had himself sworn as a witness on his own behalf. Under these circumstances, it seems the magistrate, having the defendant before him, even though he may have been brought there improperly, may proceed to try him upon an amended information not re-sworn, even though the Act under which he is tried requires information on oath, provided the defendant does not protest. The present case upon all these points seems fully covered by *Turner v. Her Majesty's Postmaster General* (1864), 5 B. & S. 756, 34 L.J.M.C. 11; 11 L.T. 369; and by *The Queen v. Hughes* (1879), 4 Q.B.D. 614: compare *Dixon v. Wells* (1890), 25 Q.B.D. 249; see also section 896 of the Criminal Code.

Being satisfied, from a perusal of the depositions, that an offence of the nature described in the conviction has been committed by the defendant, and that the magistrate had jurisdiction over it, and that the punishment imposed is not in excess of that by law provided, we should not hold the conviction invalid by reason of the fact that the date and place of the offence not being stated in it, for these clearly appear from the depositions, and we have power under sections 883 and 889 of the Criminal Code to amend the conviction by stating the offence to have been committed at Bradford on 29th July, 1902. The evidence shews that the defendant admitted, in effect, to the prosecutor that he had not worked out the amount he had received.

As to the other objections, I do not think we can hold that the defendant was not allowed to make his defence.

The objection that the conviction is headed "conviction for a penalty to be levied by distress" is of no weight. The form used was so headed, but the body of it is correctly drawn under the statute, and the heading forms no part of the conviction.

That the costs of conveying the accused to gaol are not included is a matter which might have been amended if neces-

sary; but, as a matter of fact, there are no such costs, for the prisoner never went to gaol. There is special power in the section under which the prisoner was convicted to award imprisonment in default of payment, and by ch. 90 R.S.O., sec. 4, this power covers costs as well as fine.

In my opinion, therefore, the motion to make the rule *nisi* absolute should be dismissed with costs.

Motion dismissed.

Note: Frauds on employers—Obtaining advance of transportation charges—Failure to refund—Ontario Master and Servant Act.

The Ontario Master and Servant Act, as amended in 1901 by 1 Edw. VII. (Ont.), ch. 12, sec. 14, contains the following provisions:—

5. All agreements or bargains, verbal or written, between masters and journeymen, or skilled labourers, in any trade, calling or craft, or between masters and servants or labourers, for the performance of any duties or service of whatsoever nature, shall, whether the performance has been entered upon or not, be binding on each party for the due fulfilment thereof; but a verbal agreement shall not exceed the term of one year. R. S. O. 1887, ch. 139, sec. 5.

5a. In case any person enters into an agreement under which he receives as an advance of wages, money, food, lodging, or railway or steamboat tickets to enable him to reach any place at which he has engaged to perform labour, work or other services, if such person thereafter without the consent of his employer, leaves his employment before the money or cost of such food, lodging or transportation has been repaid, he shall on proof thereof before a justice of the peace be liable on summary conviction to a penalty not exceeding \$25, and in default of payment of such penalty to imprisonment in the common gaol of the county or district for a period not exceeding thirty days, as the justice may direct.

8.—(1) Any agreement or bargain, verbal or written, express or implied, which may be made between any person and any other person not a resident of Canada, for the performance of labour or service, or having reference to the performance of labour or service by such other person in the Province of Ontario, and made as aforesaid, previous to the migration or coming into Canada, of such other person whose labour or service is contracted for, shall be void and of no effect, as against the person only so migrating or coming.

(2) Nothing in this section shall be so construed as to prevent any person from engaging under contract or agreement skilled workmen, not resident in Canada, to perform labour in Ontario in or upon any new industry not at present established in Ontario, or any indus-

try at present established if skilled labour for the purpose of the industry cannot be otherwise obtained; nor shall the provisions of this section apply to teachers, professional actors, artists, lecturers, or singers. R.S.O. 1887, ch. 139, sec. 8.

9. Any one or more of Her Majesty's Justices of the Peace may receive the complaints upon oath of parties complaining of any contravention of the preceding provisions of this Act, and may cause all parties concerned to appear before him or them, and shall hear and determine the complaint in a summary and expeditious manner. R.S.O. 1887, ch. 139, sec. 9.

10. Complaints against any person under this Act may be prosecuted and determined in any county or district in which the person complained against is found, or, except when the complaint is made by a foreman, manager, officer or other person whose wages are more than \$3 a day, in any county or district in which the person complained against carries on business. R.S.O. 1887, ch. 139, sec. 11; 59 V. ch. 38, sec. 2.

Query, whether the amendment contained in section 5a (added by sec. 14 of the Ontario statute law amendment Act of 1901) is not ultra vires of the Ontario legislature as dealing with the subject of "Criminal law" assigned by the Canadian constitution to the exclusive jurisdiction of the Parliament of Canada.

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

DISTRICT OF MONTREAL

BEFORE SIR ALEXANDRE LACOSTE, C. J., AND BOSSE, BLANCHET,
HALL, AND OUMET, JJ.

THE KING v. CARLIN (No. 2).

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits—Admissibility of evidence—Judge's comment on prisoner's challenge of jurors—Character evidence—Instruction to jury—Alleged prejudice of a juror—Finding of the triers conclusive—Weight of evidence—Impeachment of verdict—Reserved case on questions of law—Grounds for new trial—Motion for leave to appeal—Question on which reserved case not asked—Crim. Code secs, 394, 668, 677, 735, 743, 744, 747.

1. An objection to a trial and verdict on the ground that one of the jurors was not indifferent but had stated before the trial that if he were selected he would send the accused to gaol, raises a question of fact and not a question of law, and a Court of Criminal Appeal has no jurisdiction to grant leave to appeal in respect thereof under Code, section 743.
2. An objection to a verdict on the ground that it is against the weight of evidence can only be raised by obtaining leave from the trial Court under Code section 747 to apply to the Court of Appeal for a new trial.
3. Where the trial judge has refused to reserve a case upon a question of law and the Court of Appeal is then applied to for leave to appeal under Code section 744, leave cannot be granted in respect of another question of law in respect of which a reserved case had not been asked of the trial judge.
4. Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co. by bribing clerks in the company's employ to illegally and fraudulently disclose information of the secret audits of trains to be made and to furnish such information to conductors to enable them to be prepared for the audits when made and at other times to be free to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit they would communicate it to the conductor whose train was to be audited for a purpose other than that of defrauding the company.
5. Where the trial judge, after five jurors had been sworn, said to the prisoner's counsel in the hearing of the juror's composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause"—this is not misdirection or undue influence of the jury against the prisoner or his counsel, and leave to appeal should not be granted upon that ground.
6. It is not misdirection for the trial judge in charging the jury to say:

"About forty or fifty witnesses have been examined for the purpose of establishing his (the prisoner's) good character; it is very strange that it should take forty or fifty witnesses to establish it"—if the statement as to the number of witnesses as to character is in fact correct.

MONTREAL, May 22, 1903.

The judgment of the Court was delivered by

LACOSTE, C.J.:—

Carlin was indicted by the Grand Jury in the Court of King's Bench, for having, on the 29th day of August, 1902, unlawfully conspired with Johnson and others by deceit, falsehood and other fraudulent means to defraud the Canadian Pacific Railway Co. Subsequently, in accordance with the order of the Court, the Crown furnished particulars as follows:

"The conspiracy was to defraud the Canadian Pacific Ry. Co. by illegally and fraudulently obtaining by bribing and paying clerks of the company, information of the secret audits or checks of trains run by the Canadian Pacific Ry. Co., and to furnish said information to the conductors of trains, and thus enable them to be prepared for said checks or audits when made, and at other times to be free to retain fares or allow passengers to ride free on the cars or for reduced fare, thereby doing away with the object of said secret checks or audits inaugurated by the company for the purpose of preventing fraud, dishonesty and illegalities against the company."

A verdict of guilty was rendered by the petit jury. The accused then made a motion for a reserved case and a new trial, which was rejected.

In his motion for leave to appeal, the accused urges several reasons which he finally limited to the following:—

1. Because his Lordship, the presiding Judge at the trial, during the selection of the petit jurors, and after five jurors had been selected, and in the hearing of the

whole panel of jurors, addressed Mr. M. J. F. Quinn, K.C., of counsel for the prisoner, in the following terms: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause," this being irregular and of a nature to prejudice the jurors, already sworn and to be sworn, against the prisoner and his counsel;

2. Because the trial Judge refused to permit the prisoner to prove by witnesses that information would be given by one conductor in the employ of the C.P.R. Co. to another conductor of the auditing of his train for purposes other than defrauding the company, viz., for reasons quite legitimate and legal, and thus precluded the prisoner from adducing evidence to disprove the element of fraud;

3. Because the trial Judge, in charging the jury and in speaking of the number of the witnesses examined by the prisoner's counsel for the purpose of establishing the good character of the prisoner, used the following language, namely: "About forty or fifty witnesses have been examined for the purpose of establishing his good character. It is very strange that it takes forty or fifty witnesses to establish his good character," thus misdirecting the jury as to the evidence of good character, such statement, tending not only to destroy the effect of such evidence, but also to lead the jury to suspect that the prisoner did not, in fact, enjoy a good reputation and character;

4. Because one of the jurors sworn to try the case, and who had been challenged for cause by the prisoner, to wit: one Martin, was not indifferent as a juror, but was on the contrary, prejudiced against the prisoner, and had said prior to the trial, but after he had been summoned to act as juror, that if he were selected as a juror in this case he would send the prisoner to jail, although he, said, Martin, when challenged, declared himself indifferent;

5. Because the verdict of guilty was not a true and proper verdict or pronouncement agreed upon by each of

the jurors, but was the result of an arrangement entered into, between the jurors, that the majority of the jury would carry, and there would be no disagreement reported and entered, and that one of the jurors declared the prisoner guilty merely because it was represented to him by the other jurors that he had no right to dissent from the opinion of the majority;

6. Because the verdict was rendered in the absence of any proof of the existence of any conspiracy between the prisoner and any other person having for its object to defraud the C.P.R. Co.;

7. Because the verdict has been rendered against the weight of evidence.

Our Criminal Code is most explicit on the right to appeal to this Court. Section 742 says that an appeal from the verdict shall lie "in the cases hereinafter provided for and in no others." Then sec. 743 authorizes an appeal upon all questions of law arising either on the trial or on any of the proceedings preliminary, subsequent or incidental thereto or arising out of the direction of the Judge. And sec. 744 adds, that an appeal will lie upon such questions of law or misdirection if the trial Judge refuses to reserve them. Section 747 gives to the Court before which the trial takes place the power to grant to the person convicted leave to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence.

The right of appeal is thus limited by the above sections.

Applying these provisions of the law to the several grounds urged by the accused before this Court for leave to appeal, we find that we cannot entertain the fourth ground urged by the accused, that one of the jurors was not indifferent as a juror but was prejudiced against the prisoner, because this is not a question of law, but a question of fact; nor the fifth ground, that the verdict was the result of an improper arrangement entered into between the jurors, because this also is not a ques-

tion of law, but a question of fact: nor the sixth ground, that the verdict was rendered in the absence of any proof of the existence of the conspiracy, because assuming this question to be one of law, no application was made to the trial Judge to reserve such question for the opinion of the Court of Appeal: nor the seventh ground, that the verdict has been rendered against the weight of evidence, because the Court before which the trial took place did not give leave to the accused to apply to the Court of Appeal for a new trial.

Thus we have only to consider the first three reasons given by the accused for leave to appeal.

As to the first reason, having reference to the words addressed by the trial Judge to the prisoner's counsel, it cannot be considered as a question of law properly speaking, and it can avail as a ground for an appeal only under the heading of misdirection. We fail to see that the trial Judge has by using these words, misdirected the jury or unduly influenced the jury against the prisoner or his counsel. The remark of the Judge had no importance except to call the attention of the counsel to the fact that those who do not read the newspapers cannot, generally speaking, read or write; and that it might be in the interest of his client to have a good class of jurors to try the case. This objection must therefore be rejected.

Coming now to the second ground for a reserved case, that the trial Judge refused to permit the accused to prove by witnesses that information would be given by one conductor to another of the auditing of his train for purposes other than for the purpose of defrauding the company, we are of opinion that this evidence was properly rejected. A proof of that kind was altogether hypothetic. What other conductors might have done in a stated case could not authorize the jury to draw an inference in favour of the accused. The verdict has to be rendered upon the facts as proved and not upon what others might have done.

Besides "illegally and fraudulently obtaining by bribing and paying clerks of the Canadian Pacific Ry. Co., information

of the secret audits or checks of trains run by the C.P.R. Co. and to furnish such information to the conductors of trains to be so audited and checked, and thus enable them to be prepared for said checks and audits when made," (this is one of the charges mentioned in the bill of particulars), constitutes a crime even if the intention of the conspirators is not to enable the other conductors to defraud the company, but merely to protect said conductors against irregularities which are inherent to the service they perform. Conspiracy is an agreeing or combining or confederating together, of two or more persons, to accomplish some unlawful purposes, or to accomplish a lawful purpose by some unlawful means: *R. v. Nunn*, 12 Cox. C.C. 316-339; *R. v. Roy*, 11 L.C.J. 93; *R. v. Vincent*, 9 C. & P. 91.

Bishop says: "Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful either as a means or an end (New Crim. Law Com., 8th ed., sec. 171).

Whatever may have been the intention of the accused, obtaining fraudulently, by bribing, information of the secret audits and checks, and communicating the information on to the other conductors, was defrauding the company by illegal means of its system to detect frauds or thefts. Besides, it did not require any evidence to prove that information might be given by one conductor to another merely to permit the latter to be prepared for the checks without any intention to enable him to commit a fraud; and the refusal of the Judge did not deprive the accused from making a full defence.

This second ground of the application is in consequence dismissed.

There remains a third reason. The accused claims that the trial Judge misdirected the jury in using the following language: "About forty or fifty witnesses have been examined for the purpose of establishing his good character. It is very strange that it takes forty or fifty witnesses to establish his good character." He says that the above words tended not

only to destroy the effect of evidence of good character, but also to lead the jury to suspect that the prisoner did not in fact enjoy a good reputation and character. This is not the necessary inference that may be drawn from the remarks of the trial Judge. He may have referred to the uselessness of bringing so many witnesses to establish good character, but even adopting the meaning put on the words by the accused, it was an expression of opinion of the Judge which he had the right to make, leaving, however, the evidence of good character to the appreciation of the jury. It is admitted under our system of criminal law that the trial Judge can give his own appreciation of the evidence, which may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury, who must decide finally as to the guilt of the accused.

This third and last ground must therefore be rejected.

And in consequence the leave to appeal is refused.

Application dismissed.

M. J. F. Quinn, K.C., C. A. Wilson and N. K. Laflamme, for the prisoner.

J. P. Cooke, K.C., and Eugène Lafleur, K.C., Crown prosecutors.

[COURT OF GENERAL SESSIONS, COUNTY OF
HALDIMAND, ONTARIO.]

BEFORE HIS HONOUR T. A. SNIDER, COUNTY JUDGE.

COLLINS v. HORNING.

*Agricultural fairs—Exhibition prizes—Horse racing—Classification—
Fraudulent entry—Ontario statute respecting—Validity of—Amend-
ment of conviction on appeal—Costs of conveying to gaol—R.S.O. 1897,
ch. 254—R.S.O. 1897, ch. 90, sec. 4—2 Edw. VII. (Ont.), ch. 12, sec.
15.*

1. The Ontario statute respecting the fraudulent entry of horses at exhibitions is one regulating the rights between individuals by preventing unfair competition, and is intra vires of the provincial legislature.
2. The statute applies whether or not the horse entered at the exhibition has a previous "record" of speed or not, and a classification of the horses by their age is within the Act.
3. Where the costs and charges of conveying to gaol are imposed in case of non-payment of the fine under the "Ontario Summary Convictions Act," the amount thereof must be stated in the conviction; but a conviction improper in that respect may be amended under 2 Edw. VII. (Ont.) ch. 12, sec. 15, upon an appeal, by striking out the award of such costs.

DECIDED: June 20, 1903.

APPEAL from a conviction by a Justice of the Peace under ch. 254, R.S.O., being an Act to prevent the fraudulent entry of horses at exhibitions.

That statute taken from 54 Vict. (Ont.), ch. 53, provides as follows:—

1. No person shall enter or cause to be entered for competition for any purse, prize, premium, stake or sweepstake, offered or given by any agricultural or other society, or association where the contest is to be decided by speed, any horse, colt, or filly, under a false or assumed name or pedigree, or in a class different to which such horse, colt or filly properly belongs by the rules of the society or association in which such contest is to take place.

2. The name of a horse, colt or filly, for the purpose of entry for such competition in any contest of speed, shall not be changed, after having once been entered in any such contest, except as

provided by the code of rules of the society or association under which the contest is conducted.

3. The class to which a horse, colt or filly properly belongs, for the purpose of entry in any such contest of speed shall be determined by the public performance of such horse, colt or filly in some former, if any, contest or trial of speed, as provided by the rules of the society or association, under which the proposed contest is to be conducted.

4. Any person violating any of the provisions contained in this Act, shall be guilty of an offence thereunder and shall, on conviction before any Justice of the Peace, under a prosecution to be commenced within two years from the commission of the offence, forfeit and pay a sum not less than \$50 nor more than \$200 for each offence, together with costs, and in case of non-payment shall be liable to imprisonment for a term not exceeding six months.

E. E. A. DuVernet, for appellant.

Harrison Arrell, for prosecutor.

CAYUGA, ONT., June 20, 1903.

SNIDER, Co.J.:—The Oneida and Seneca Agricultural Societies held their annual fair on 9th and 10th of October, 1902, at the village of Caledonia.

Amongst other attractions at the fair was advertised a 3-year old colt race—prize \$100 divided into three prizes of first, second and third, \$50, \$30 and \$20 respectively.

I find G. H. Horning entered a colt called “Billie Spinx” in said race. That the said colt was past four years old at the time of such entry, on October 10th.

The offence, if any, was complete on entry. The objection that no objection was taken until after entry and payment of fee, is not, in my opinion, an answer. Nothing could have lessened the offence, even if the directors had consented it would not have excused the person making the entry. The Act is not to protect the society, but such persons as may take the pains and

incur the expense necessary to prepare a three year old colt for such race, from unfair competition with horses older than the named age. I think it is distinctly an Act to regulate the rights between individuals. I therefore find that ch. 254, R.S.O., is *intra vires* of the Provincial Legislature.

Regina v. Wason, 17 A.R. 221, is replete with learning on the subject, and if I read it rightly, supports my conclusion, though I am of the opinion the present case is more plainly one of individual rights than the one cited. That case shews, if an act be a crime, an Act of the Provincial Legislature dealing with it is *ultra vires* of the Legislature, so also if the Act of the Legislature deal with a subject afterwards declared to be a crime by Parliament.

Chapter 254 was passed in 1891; so far as I am able to find the subject there dealt with has not since that time been declared to be a crime, hence if I find it to be a crime I must find it was so at the time of its passing, which I do not so find. *Regina v. Wason* also shews that an Act within the jurisdiction of the Legislature which declares an act to be an offence may provide penalty and imprisonment for its violation without converting it into a crime; also that every possible presumption is to be made in favour of the constitutionality of the Provincial Act.

To make a provision which separates particular individuals of a species from all other of that species and group them together must make of those so separated and grouped, a class distinct from all other of the same species. Thus, when from the whole family of horses those of a particular age are separated and grouped together they must form a class, as much so as though they were marked by any other means. I therefore hold the horses entered in the three year old race at Caladonia on October 10th, 1902, made a class within the meaning of ch. 254, and that sec. 3 of that Act is to govern where the class is marked by "records," that is time made at former races, "if any." If this be not the case, the words "if any" are useless in the Act, and except for horses that have done public racing the Act makes no provision or protection. I cannot hold that view. The very

reason of the Act is to encourage raising good stock, which include colts that have never been raced and not race horses, with records only.

The conviction directs the penalty to be paid and applied according to law, I therefore am of the opinion its proper disposition will be under R.S.O. ch. 107, sec. 2.

I am of opinion that the conviction is wrong in providing for costs and charges of conveying to gaol, the amount of such costs not being ascertained in the conviction: R.S.O. ch. 90, sec. 4, sub-sec. 3; but I find I have power of amendment by 2 Edw. VII., ch. 12, sec. 15, and I amend the conviction by striking out of the same the words "and the costs of and the charges of conveying the said G. H. Horning to the said common gaol," where they occur in the last three lines of the conviction.

As to the uncertainty, the conviction states the time, place and society when and where the offence was committed, and states the offence in nearly the words of the statute if not exactly so. If, however, there is an uncertainty in the conviction, I shall follow *Regina v. Coulson* (1893), 1 Can. Cr. Cas. 114, where Armour, C.J., says: "But the magistrate had jurisdiction, and we ought therefore to look at the evidence to see if an offence was committed, and if so, we should amend the conviction."

I will amend the conviction by adding in the eighth line of the conviction after the letter "a" the words "four year old," and after the words in the same line the words "named Billie Spinx," and after the word "class" in the same line the words "for three year old colts being a class," so that it will read "a four year old horse, named Billie Spinx, in a class for three year old colts, being a class different to which, etc."

In *The Queen v. Button*, [1900] 2 Q.B. 597, in order to compete in a race, Button falsely represented his name was Sims, and that he had never won a race as stated, by reason of which he was given advantages in the race which he won, and claimed the prize. That case is not like the one I am considering.

Here the defendant refused to make any representation as to his horse's age, simply offered him and entered him in the race

as a three year old. I cannot see that there was anything criminal in what was done. He suggested the horse was three years old, knowing it to be untrue; but declined to make the statement. In order to violate the Act under which the conviction was made, an entry improperly made is all that is necessary. The Act does not say knowingly made. I must conclude the conviction is well founded.

I dismiss the appeal with costs, payable by G. H. Horning to W. A. Collins, the prosecutor.

Conviction affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., WEATHERBE AND RITCHIE, JJ., GRAHAM,
E.J., AND MEAGHER, J.

THE KING v. TOWNSHEND (No. 2).

*Stated case—Application to magistrate after unsuccessful appeal from
summary conviction—Res judicata—Crim. Code secs. 879, 880, 900.*

1. Where an appeal has been taken to a County Court under Crim. Code section 879 from a summary conviction and the County Court has affirmed the conviction, it is not open to the accused to afterwards have the convicting magistrate refer a "stated case" to a superior Court.
2. The decision of the County Court being *res adjudicata* between the parties is a bar to the application for a "stated case."

ARGUED: March 25, 1902.

DECIDED: May 6, 1902.

Defendant was convicted before S. H. Pelton, Esquire, a stipendiary magistrate in and for the County of Yarmouth, for having unlawfully, and in contravention of the Fisheries Act, angled for and taken trout in Canadian waters, in said county, without having first obtained an angler's permit, as required by the regulations made under said Act.

Defendant was a citizen of the United States, residing and doing business at or near Philadelphia, and had been in the habit, for several years, of coming to this Province for the purpose of fishing for trout. He was the owner of a building, used as a fishing camp, situated near Kempt, in the County of Yarmouth, and was in the habit of employing boats and men, belonging to the County of Yarmouth, for the purpose of assisting in fishing. He had made enquiry, on several occasions, in relation to a fishing license, and had been informed that it was not necessary for him to have one. On the last occasion he was approached by someone, who claimed to be a fishery officer, and was asked to take out a license, but declined to do so.

An appeal was taken from the conviction to the Judge of the County Court at Yarmouth, who dismissed the appeal (*Vide*

The King v. Townshend (No. 1), 5 Can. Cr. Cas. 143), and confirmed the conviction, on the grounds:

1. That defendant was not exempt from the regulation requiring the taking out of a permit.
2. That he was not a person temporarily domiciled in Canada, within the meaning of the amended regulation of August 1st, 1894.
3. That he was guilty of a violation of the Fisheries' Act, and was properly convicted.

Application was subsequently made to the stipendiary magistrate to state a case for the opinion of the Court, under the Criminal Code, sec. 900, which he did, although entertaining great doubt as to his power to do so.

HALIFAX, March 25, 1902.

F. F. Mathers, for the prosecutor.—A case cannot be stated for the opinion of the Court after the decision on the appeal to the County Court. The magistrate can only state a case while he has jurisdiction over the matter. Code sec. 900, sub-secs. 2 and 14; secs. 817, 883, 880, sub-sec. (e). It was intended that the decision of the County Court on the appeal should be final. Sec. 880, sub-sec. (e), and sec. 887. *The King v. Beamish* (1901), 5 Can. Cr. Cas. 388, 38 Can. L.J. 58. No recognizance has been filed under the Code, sec. 900, sub-sec. 4. *The King v. Geiser* (1901), 5 Can. Cr. Cas. 154.

C. S. Harrington, K.C., for the defendant, contra.—Code sec. 900, sub-sec. 5 makes it imperative on the justice to state a case, where he is requested to do so by the Attorney-General. Under sub-sec. 6, one of the parties may come to the Court to compel the justice to state a case. Seager's Mag. Man. 81. The Criminal Code, sec. 900, sub-sec. 14, provides that where a party applies to have a case stated, he abandons his right of appeal to the County Court, which is the converse of the argument of the other side, and the inference is that a case can be stated after an appeal to the County Court. Short & Mellor's Crown Office

Pr. 474-479. The Code contemplated proceedings after appeal. Secs. 895, 896. The fact that there was an appeal to the County Court is not properly before this Court. We have had no notice of the defect in the stated case, with respect to the recognizances. *In re Bishop Dyke*, 6 R. & G. 65, 263. It is not necessary that the recognizances should be in the case. The evidence here establishes that the defendant was temporarily domiciled in Nova Scotia, and there was no evidence to support the conviction. Orders-in-Council, 1885, pp. 59, 60. The words "temporarily domiciled" must be given some meaning, and the reasonable meaning is "temporarily resident."

F. F. Mathers, in reply.—The acts relied upon to constitute a temporary domicil must resemble the acts which constitute a permanent domicil. A temporary residence for a special purpose is not enough. *Lord v. Colville*, 4 Drury 376.

HALIFAX, May 6, 1902.

GRAHAM, E. J., delivered the judgment of the Court:—

The defendant was summarily convicted before a Stipendiary Magistrate for violating certain regulations made under the Fisheries' Act of Canada, sec. 17. Under the Criminal Code, sec. 879, the defendant appealed to the County Court for District No. 3, and the conviction was affirmed. No appeal lies (I mean a pure appeal), or was asserted, to this Court from that judgment, and the point now sought to be raised was the point adjudicated upon in that judgment. It is reported in 5 Canadian Criminal Cases 143. But the defendant thereupon took this course. He went back to the Stipendiary Magistrate, and asked him to state a case for this Court, questioning the conviction. And the Attorney-General having, under sub-section 5, requested the Stipendiary Magistrate to state the case, he did not refuse to do so.

I am of opinion that no case could be stated at that stage of the proceeding.

By sub-section 14 of section 900 it is provided that:—

“Any person who appeals, under the provisions of this section, against any decision of a justice, from whom he is entitled to an appeal, under section 879 of this Act, shall be taken to have abandoned such last-mentioned right of appeal finally and conclusively, and to all intents and purposes.”

Under section 881 of the Code it is provided that witnesses may be heard before the County Court, on the appeal, who were not called before the Stipendiary Magistrate. This might lead to an entirely different case being established above from that which was made before the Stipendiary Magistrate. And, among other things, a conviction which was bad may there be made good.

Now, I am of opinion that with that judgment in the way, the defendant cannot ask the Stipendiary Magistrate to have a case stated, that he may question the conviction before this Court. The matter is *res adjudicata*.

The statute providing for the stating of a case has abundant application to those cases in which a judgment on appeal has not been given. There would be an anomaly, too. It would have to be held that when the effect of sub-section 14 is to deprive a person of having an appeal to the County Court, and an appeal by way of a case stated to this Court running concurrently, he may take them in succession, by waiting until judgment is obtained in the County Court appeal.

Of course, the application for a case stated, at this stage, could not be attempted in England, because, by a rule made under the Act, there is a time limit of seven days for applying for a stated case. But it has been held that the Court would not compel a justice to state a case when he has decided a point of law in accordance with a previous decision of the Queen's Bench Division, the justice being bound by that decision. *Reg. v. Thiel*, 82 Law Times 587. A fortiori, he should not state a case here when he was bound by the judgment of the County

Court in this identical case, and binding as a *res adjudicata* between the parties.

The case should be quashed, and with costs.

Case quashed with costs.

Note: Summary conviction—Review by stated case or appeal—Option—
Cr. Code secs. 879, 900.

The procedure by way of "stated case" is a form of appeal. *R. v. Robert Simpson Co.* (1896), 2 Can. Cr. Cas. 272.

A person "appeals" when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. *Cooksley v. Toomaten Oota* (1901), 5 Can. Cr. Cas. 26 (B.C.).

The granting of an application for a stated case is analogous to the service of a notice of appeal, the recognizance in a proceeding by stated case not being operative until the magistrate has granted the application. Code sec. 900, sub-sec. (6).

A person who obtains the stating of a case under Code sec. 900 elects that mode of appeal and cannot revert to an appeal to the Sessions or County Court under sec. 879, although he has failed to prosecute the stated case and has allowed the same to be dismissed for want of prosecution. *Cooksley v. Toomaten Oota* (1901), 5 Can. Cr. Cas. 26 (B.C.).

So, also, where a question of law has been disposed of by the decision on a stated case, the party who obtained the case to be stated cannot have the same question reviewed upon a motion to quash the conviction removed by certiorari, the matter being *res judicata*. *R. v. Monaghan* (1897), 2 Can. Cr. Cas. 488 (N.W.T.).

[COURT OF KING'S BENCH, QUEBEC.]

CROWN SIDE.

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

THE KING v. KOMIENSKY (No. 1).

Speedy trial—Electing trial without a jury—Actual custody a pre-requisite—Effect of return of true bill by Grand Jury—Exclusive jurisdiction of jury court—Crim. Code secs. 765, 767.

1. An accused person who has been committed for trial at the preliminary inquiry, or who has been bailed under Code sec. 601 to appear for trial, has no right to elect a speedy trial without a jury unless he is in actual custody at the time of electing.
2. The surrender and election in favour of speedy trial of a person who, at the preliminary inquiry, was bailed to appear for trial, must take place before a true bill has been found by the Grand Jury and filed of record in the jury court, and unless so made the jury court will have exclusive jurisdiction.
3. Sub-section 5 of Code section 767 confers the right to re-elect in favour of a speedy trial, notwithstanding a pending indictment, only in case the accused has been arraigned under the speedy trials procedure, and has thereupon elected against a speedy trial.

MONTREAL, March 19th, 1903.

WÜRTELE, J.:—An information was laid before His Honour Judge Desnoyers, one of the Judges of the Sessions of the Peace in the District of Montreal, charging David Komienksy, the defendant, with having obtained goods by false pretences from the Strathcona Rubber Company, and, after having held a preliminary inquiry the judge was of opinion that the evidence was sufficient to put him on his trial, and he admitted him to bail to appear before the Court of King's Bench in the District of Montreal, at the present term, to be tried for the offence. Three bills of indictment were preferred against him, founded upon the evidence taken before the judge at the preliminary inquiry and upon the facts disclosed in the depositions and the grand jury

found them well founded and returned them into court on the 3rd March instant; and they were then filed of record. The defendant was arraigned on the three indictments on the 5th March instant; and, without raising any objection, he pleaded not guilty and a day was immediately fixed for his trial on them. He then gave new bail and the sureties in the first recognizances taken before the examining judge were discharged. On the 17th March instant, the defendant's new sureties brought him into court and moved that they should be allowed to render him in discharge of their recognizance and that he should thereupon be committed to gaol. The motion was allowed and the defendant was immediately surrendered by his sureties to the gaoler and committed to gaol. Then the defendant moved, inasmuch as the trials on the three indictments had not yet commenced and as the charges made against him in such indictments were susceptible of trial without a jury, or, in other words, were susceptible of speedy trials, under the provisions of Part LIV. of the Criminal Code, that an order should be made allowing the defendant to be taken before one of the judges of sessions in the District of Montreal to declare his option for speedy trials on the three indictments, and that it should be ordered that the records and proceedings in connection with the charges of having obtained goods by false pretences be transmitted to the Court of Special Sessions for that purpose.

For this court to allow the defendant to be taken before one of the judges of sessions to declare his option for speedy trials on the charges made in the information and on the facts disclosed in the depositions and in the indictments which were subsequently found against him of having obtained goods by false pretences and to order that the records and proceedings in the three cases should be removed from the Court of King's Bench and transmitted to the Court of Special Sessions, it would be necessary that in these three cases the defendant should be entitled under the law to ask for and to have speedy trials. If he has that right he should be brought before one of the judges of sessions and be allowed speedy trials, without a jury, but if he

has no such right he must be tried in the ordinary way before this court, which has full power and authority to try all indictable offences.

Section 765 of the Criminal Code provides that every person who has been committed to gaol for trial on a charge of having committed an offence within the jurisdiction of the general or quarter sessions of the peace, may, with his own consent, be tried in the Province of Quebec before a judge of the sessions of the peace without a jury, instead of being tried in the ordinary way before the court in which, but for such consent, he would be triable, even if such court is or is not then in session, but this privilege or right to obtain a speedy trial is subordinate to the provisions contained in Part LIV. of the Criminal Code. The second sub-section of section 765 enacts that a person who has been allowed bail and who subsequently is placed in custody awaiting trial on the charge made against him, shall be deemed to have been committed for trial within the meaning of the section.

The provisions alluded to relate to the mode or procedure to be followed, and this procedure is that the sheriff must notify one of the judges of sessions that a person has been committed to gaol or is in gaol awaiting trial, stating at the same time the prisoner's name and the nature of the charge made against him, and that the judge of sessions should cause the prisoner to be brought before him and after having obtained the depositions taken at the preliminary inquiry, should state to the prisoner that he has been committed for trial, or that he is in custody awaiting trial for an offence which the judge must describe, and that he has option to have a speedy trial or to be tried in the ordinary way by the court having in the ordinary course jurisdiction over the case.

In the present cases the prisoner did not, and could not, make any option before the indictments were found against him and were filed of record in the court and before he was arraigned on them and pleaded not guilty, as he was not, when such proceedings took place, in custody. When the accused is not in custody

at the time a true bill is found on the bill of indictment which has been preferred on the charge made against him as disclosed in the depositions taken at the preliminary inquiry, or when the indictment is filed of record or when he has been arraigned and has pleaded to the indictment, the forum or tribunal where his trial is to take place is finally fixed. Jurisdiction over the case is then determinately established and fixed and belongs absolutely and exclusively to the court which has among its records the indictment; and the case cannot be removed from it, even by consent of the crown and of the accused, to the court of record for speedy trials as consent cannot confer jurisdiction in criminal prosecutions.

But the prisoner contends that he has nevertheless the right to do so now, as since the proceedings he has been surrendered by his sureties, and as he is presently in custody; and in support of his contention he refers to sub-section 5 of section 767. This sub-section provides that when a prisoner has elected to be tried by jury, he may notify the sheriff that he desires to re-elect and then on being brought before the judge of sessions he may make a second election and be proceeded against as if his first election had not been made. The prisoner, however, was never brought before one of the judges of sessions and never made any option or election, and never had any such right, as he was not in custody until after he had pleaded to the indictments, and he consequently does not fall under the purview of the sub-section on which he founds his contention; he never made an election and cannot, therefore, make a re-election.

When, however, before a bill of indictment has been preferred, a person in custody awaiting trial has legally elected for a speedy trial, a bill of indictment cannot afterwards be preferred, and the accused cannot be deprived of such speedy trial; and if an indictment is thus illegally found, it must on motion be quashed; but these circumstances do not exist in the present cases. If the indictment has not been quashed, it stands and the trial must take place on it.

Jurisdiction to hold a speedy trial is strictly limited by the terms of section 765, and such jurisdiction is only conferred when the accused has been committed for trial, or is otherwise in custody awaiting trial, on the charge made against him. When, after committal for trial, or when after bail has been given to appear for trial, the accused is placed in custody and in either case a speedy trial has not been asked for nor allowed, and a bill of indictment has been preferred and a true bill has been found, the indictment so found becomes and is the charge against the accused, and the depositions taken at the preliminary inquiry against the accused are then only available for the purpose of contradicting the witnesses at the trial, of testing their veracity, or of refreshing their memory, except if a deponent is dead, sick or absent, when his deposition may be read as evidence. If the indictment should be quashed because it discloses no indictable offence under the law, the accused could not be detained to answer the charge mentioned in the commitment and in the depositions on which the indictment was framed, and which only disclose the same facts as the indictment.

In cases such as the present ones, on the finding of true bills, the court is finally seized with the prosecution, and exclusive jurisdiction over them is vested in the court, which is the only competent forum or tribunal to carry them in due course and in the ordinary way to their final stage of either conviction or acquittal by the petty jury. As I have already stated, when an indictment has been found and pleaded to, the accused's plea fixes conclusively the tribunal and the mode of trial; the trial must be before the court seized with the indictment, it must be before a petty jury, and must be conducted in the ordinary way.

The defendant has consequently no right to ask for and obtain speedy trials and must be tried by the Court of King's Bench, which is the competent tribunal and which alone has jurisdiction over the cases.

The main object for which the right to ask for and obtain a speedy trial was granted by Parliament is to give a prisoner the opportunity of being tried without suffering a long detention

while awaiting the regular term of the court which has jurisdiction to try him, and to which he has been committed or bailed for trial and looking at the matter in a practical way the reason does not seem to apply to the three cases in question, as the court is now sitting and the defendant will be tried without delay. It surely was never intended that after an indictment has been found, after the accused has been arraigned and has pleaded to the indictment, and when the court is in session and is ready to proceed to his trial, the accused could arbitrarily remove the case from the court seized with it and having competent jurisdiction, to another court. The only apparent object would be to obtain delay, cause embarrassment and hinder the proceedings and impede the due course of justice, and thus perhaps escape a trial. The motion is dismissed.

Application refused.

J. P. Cooke, K.C., for the Crown.

R. A. E. Greenshields, K.C., James Crankshaw and H. A. Hutchins, for the prisoner.

APPENDIX.

CRIMINAL LAW AMENDMENTS, 1903.

AN ACT TO AMEND THE NORTHWEST TERRI- TORIES ACT.

(Statutes of Canada, 3 Edw. VII., chapter 40.)

2. Appeals.—Except where a question has been reserved and stated for the opinion of the Supreme Court of the Northwest Territories as a court of appeal under section 743 of *The Criminal Code*, 1892, the judge by or before whom the judgment, order or decision then in question was rendered or made, shall not sit as one of the judges composing the court unless his presence is necessary to compose a quorum.

2. The proviso added to section 50 of the said Act by section 4 of chapter 17 of the statutes of 1894 is repealed.

REFORMATORY PRISONS.

An Act further to amend the Act respecting Public and Reformatory Prisons.

(Statutes of Canada, 3 Edw. VII., chapter 51.)

[Assented to 24th October, 1903.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Certified Industrial Schools.—Wherever the words “Ontario Reformatory for Boys” occur in chapter 183 of the Revised Statutes, intituled *An Act respecting Public or Reformatory Prisons*, or in any other statute of Canada, they

shall be construed to apply to and include all certified Industrial Schools in the province of Ontario, either or any of which shall be and shall be considered to be the Ontario Reformatory for Boys for all purposes so far as such statute is applicable, as soon as the Lieutenant Governor in Council of the province of Ontario makes an order that no boys are to be sentenced to the said reformatory.

2. Transfer.—Any boy now under committal to, or confined in, the Ontario Reformatory for Boys may be transferred to a certified Industrial School.

THE RAILWAY ACT, 1903 (CAN.).

(Statutes of Canada, 3 Edw. VII., chapter 58.)

241. Railway Constables.—Any two justices of the peace, or a stipendiary or police magistrate, in the Provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, or Manitoba, or the District of Keewatin, and any Judge of the Court of King's Bench or Superior Court, or clerk of the peace, or Clerk of the Crown, or Judge of the sessions of the peace, in the Province of Quebec, and any Judge of the Supreme Court, or two justices of the peace, in the North-West Territories, and any commissioner of a Parish Court in the Province of New Brunswick, within whose several jurisdictions the railway runs, may, on the application of the Company or any clerk or agent of the Company, appoint any persons recommended for that purpose by such company, clerk or agent, to act as constables on and along such railway; and every person so appointed shall take an oath or make a solemn declaration, which may be administered by any judge or other official authorized to make the appointment or to administer oaths, in the form or to the effect following, that is to say:—

“I, A.B., having been appointed a constable to act upon and along (here name the railway), under the provisions of ‘The Railway Act, 1903,’ do swear that I will well and

truly serve our Sovereign Lord the King in the said office of constable, without favour or affection, malice or ill-will, and that I will, to the best of my power, cause the peace to be kept, and prevent all offences against the peace; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge the duties thereof faithfully, according to law. So help me God." 51 Vict. ch. 29, sec. 281 Am.

Such appointment shall be made in writing, signed by the official making the appointment, and the fact that the person appointed thereby has taken such oath or declaration shall be indorsed thereon by the person administering such oath or declaration.

2. Every constable so appointed, who has taken such oath or made such declaration, may act as a constable for the preservation of the peace, and for the security of persons and property against unlawful acts on such railway, and on any of the works belonging thereto, and on and about any trains, roads, wharfs, quays, landing places, warehouses, lands and premises belonging to such company, whether the same are in the county, city, town, parish, district or other local jurisdiction within which he was appointed, or in any other place through which such railway passes or in which the same terminates, or through or to which any railway passes which is worked or leased by such company, and in all places not more than a quarter of a mile distant from such railway, and shall have all such powers, protections and privileges for the apprehending of offenders, as well by night as by day, and for doing all things for the prevention, discovery and prosecution of offences, and for keeping the peace, which any constable duly appointed has within his constablewick. 51 Vict. ch. 29, sec. 282 Am.

3. Any such constable may take such persons as are punishable by summary conviction for any offence against the provisions of this Act, or of any of the Acts or by-laws affecting the railway, before any justice or justices appointed for any county, city, town, parish, district or other local jurisdiction within

which such railway passes; and every such justice may deal with all such cases, as though the offence had been committed and the persons taken within the limits of his jurisdiction. 51 Vict. ch. 29, sec. 283 Am.

4. Any county court judge, or stipendiary police magistrate, in either of the Provinces of Ontario, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, or Manitoba, or in the District of Keewatin, and any judge of the Court of King's Bench or Superior Court, or judge of the sessions of the peace, in the Province of Quebec, and any Judge of the Supreme Court in the North-West Territories, may dismiss any such constable who is acting within their several jurisdictions; and the Company, or any clerk or agent of such Company, may dismiss any such constable who is acting on such railway; and upon every such dismissal, all powers, protections and privileges which belonged to any such person by reason of such appointment, shall wholly cease; and no person so dismissed shall be again appointed or act as constable for such railway, without the consent of the authority by whom he was dismissed. 51 Vict. ch. 29, sec. 284 Am.

5. The Company shall cause to be recorded in the office of the clerk of the peace, for every county, parish, district or other local jurisdiction in which such constable is appointed the name and designation of every constable so appointed at its instance, the date of his appointment, and the authority making it, with such appointment or a certified copy thereof, and also the fact of every dismissal of any such constable, the date thereof, and the authority making the same, within one week after the date of such appointment or dismissal, as the case may be; and such clerk of the peace shall keep a record of all such facts in a book which shall be open to public inspection, and shall be entitled to a fee of fifty cents for each entry of appointment or dismissal, and twenty-five cents for each search or inspection, including the taking of extracts. Such record shall, in all courts, be *primâ facie* evidence of the due appointment of such constable and of his jurisdiction to act

as such, without further proof than the mere production of such record. 51 Vict. ch. 29, sec. 285 Am.

6. Every such constable who is guilty of any neglect or breach of duty in his office of constable, shall be liable, on summary conviction thereof, within any county, city, district or other local jurisdiction wherein such railway passes, to a penalty not exceeding eighty dollars, or to imprisonment, with or without hard labour, for a term not exceeding two months. Such penalty may be deducted from any salary due to such offender, if such constable is in receipt of a salary from the company. 51 Vict. ch. 29, sec. 286.

291. Railway Offences.—Every person not connected with the railway, or employed by the Company, who walks along the track thereof, except where the same is laid across or along a highway, is liable on summary conviction to a penalty not exceeding ten dollars.

2. Every person who wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a Company, or removes, obliterates, defaces or destroys any printed or written notice, direction, order, by-law or regulation of a Company, or any section of, or extract from this Act or any other Act of Parliament, which a Company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the Company, or any car upon any railway, shall be liable on summary conviction to a penalty not exceeding fifty dollars, or, in default of payment, to imprisonment for a term not exceeding two months.

3. Every person who enters upon any railway train without the knowledge or consent of an officer or servant of the Company with intent fraudulently to be carried upon the said railway without paying fare thereon, or who wilfully obstructs or impedes any officer or agent of the Company in the execution of his duty upon any train, railway, or upon any of the premises of the Company, or who, not being an employee of the Company, wilfully trespasses by entering upon any of the stations, cars or buildings of the Company, in order to occupy the same for his

own purposes, shall be liable to the like penalty or imprisonment, and shall be liable to be proceeded against and dealt with in like manner, as mentioned in sub-section two of this section in regard to the offences therein mentioned.

4. Any person charged with an offence under this section shall be a competent witness on his own behalf. 51 Vict. ch. 29, sec. 273 Am.; 62 & 63 Vict. ch. 37, sec. 4.

295. Intoxication of Conductors and Drivers.—Every person who is intoxicated while he is in charge of a locomotive engine, or acting as the conductor of a car or train of cars, is guilty of an indictable offence and liable to ten years imprisonment. 51 Vict. ch. 29, sec. 292.

2. Every person who sells, gives or barter any spirituous or intoxicating liquor to or with any servant or employee of any Company, while on duty, is liable on summary conviction to a penalty not exceeding fifty dollars, or to imprisonment with or without hard labour, for a period not exceeding one month, or to both. 51 Vict. ch. 29, sec. 293.

297. Violation of By-Laws.—Every person who wilfully or negligently violates any by-law, rule or regulation of the Company is liable, on summary conviction, for each offence, to a penalty not exceeding the amount therein prescribed, or if no amount is so prescribed, to a penalty not exceeding twenty dollars; but no such person shall be convicted of any such offence, unless at the time of the commission thereof a printed copy of such by-law, rule or regulation was openly affixed to a conspicuous part of the station at which the offender entered the train or at or near which the offence was committed. 51 Vict. ch. 29, sec. 296.

298. Damaging Freight with Intent to Steal.—Every person who—

(a.) bores, pierces, cuts, opens or otherwise injures any cask, box or package, which contains wine, spirits or other liquors, or any case, box, sack, wrapper, package or roll of goods, in, on or about any car, wagon, boat, vessel, warehouse, station house,

wharf, quay or premises of, or which belong to any company, with intent feloniously to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof, or,—

(b.) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof,—

is liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so taken or destroyed, or to imprisonment, with or without hard labour, for a term not exceeding one month, or to both. 51 Vict. ch. 29, sec. 297.

300. Recovery of Penalties.—Where any penalty, prescribed for any offence under this Act, is one hundred dollars or less, with or without imprisonment, the penalty may, subject to the provisions of this Act, be imposed and recovered on summary conviction before a justice of the peace; and where the penalty prescribed is more than one hundred dollars and less than five hundred dollars, the penalty may, subject, as aforesaid, be imposed and recovered on summary conviction before two or more justices, or before a police magistrate, a stipendiary magistrate or any person with the power or authority of two or more justices of the peace.

2. Whenever the Board shall have reasonable ground for belief that the Company, or any person or corporation is violating or has violated any of the provisions of this Act in respect of which violation a penalty may be imposed under this Act, the Board may request the Attorney-General for Canada to institute and prosecute proceedings on behalf of His Majesty the King against such company or person for the imposition and recovery of the penalty provided under this Act for such violation, or the Board may cause an information to be filed in the name of the Attorney-General for Canada for the imposition and recovery of such penalty.

3. No prosecution shall be had against the Company for any penalty under this Act in which the Company might be held liable for a penalty exceeding one hundred dollars, without the leave of the Board being first obtained.

PROVINCE OF MANITOBA.

An Act respecting the Branding of Cattle

(Statutes of Manitoba, 3 Edw. VII., chapter 6.)

[Assented to March 18th, 1903.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

1. This Act may be cited as "The Cattle Brand Act."

2. When the following words occur in this Act, or in the schedule hereto, they shall be construed in the manner mentioned, unless a contrary intention appears:—

(a). The term "cattle" means any bull, steer, ox, cow, heifer or calf.

3. There shall be kept in the Department of Agriculture and Immigration a register in which shall be recorded a full description of the brands or markings of cattle, the shape, size and locality thereof, and such other matters and things as the Minister of Agriculture and Immigration may deem necessary, together with the date of such recording.

4. Any person desiring the allotment to him of a brand shall deliver or transmit to the Minister of Agriculture and Immigration an application in form "A" of the schedule hereto annexed.

5. Upon being satisfied that the application is in conformity with the provisions of this Act, and upon payment of a fee of one dollar, the Minister of Agriculture and Immigration shall allot to such applicant a brand, which shall be duly recorded in the register as aforesaid, and place a true copy of the markings constituting same upon such application, and no two persons shall be allotted the same markings or brands, and such person shall then have the sole and exclusive right in the Province of Manitoba to adopt and use such brand.

6. Upon the recording of any brand as aforesaid the Minister of Agriculture and Immigration shall deliver or transmit to the applicant, to whom such brand is allotted, a certificate of the record thereof, the production of which shall in any Court be *prima facie* evidence of the ownership of such brand.

7. The Minister of Agriculture and Immigration shall, at the end of every month, transmit to the King's Printer, for publication in the first issue of *The Manitoba Gazette* thereafter, a statement showing the name and address of the owner of each brand recorded during such month, and the township and range in which such brand is to be in use, and the marking constituting such brand.

8. In all suits in law or in equity, or in any criminal proceedings, where the title to any cattle is involved, the brand shall be *prima facie* evidence of the ownership of the person whose brand it may be, provided that a certificate of allotment of such brand has been duly issued under the provisions of this Act.

9. The right to any brand recorded under the provisions hereof may be transferred by the owner thereof named in the certificate signing in the presence of a witness an assignment thereof, the execution of which assignment shall be verified by an affidavit of the witness sworn to before a commissioner for taking affidavits, a notary public or a justice of the peace, and such assignment shall be filed in the office of the Department of Agriculture and Immigration, whereupon the Minister of Agriculture and Immigration shall issue a new certificate to the assignee as "assignee" under a new number, but having the same brand markings and showing on the face thereof that same is in lieu of the original certificate, and such assignee shall pay therefor the same fees as for an original certificate issued under this Act.

10. Any person marking any of his cattle with the mark or registered brand of any other person while the same mark or

brand is held by such other person, or marking or attempting to brand with his own or any other brand, or obliterating, altering, destroying or defacing any brand on any cattle not belonging to himself, without the consent of the owner of such cattle, shall be liable to a fine not exceeding two hundred dollars, or in default of payment of such fine, to imprisonment for any term not exceeding three months.

11. Upon every transfer of any cattle marked with the recorded brand of the transferor the transferor shall also mark his vent on the cattle so transferred unless, at the time of such transfer, the said brand is transferred to the transferee of such cattle. Provided, however, that any transferee taking possession of any cattle for the purpose of slaughtering or shipping such cattle out of the Province may waive his right to claim that such cattle be branded with a vent mark, but in such case the transferor shall give to the transferee a statement in form in Schedule "B" hereto, which shall be accepted as evidence of the transfer of such cattle wherever such evidence may be required for the space of thirty days from the date of such statement.

12. This Act shall come into force on the first day of June, 1903.

SCHEDULE A.

"THE CATTLE BRAND ACT."

To the Department of Agriculture and Immigration.

I (*or we*) desire to have allotted to me (*or us*) a brand and to have the same recorded in your office, and a certificate thereof duly forwarded to me (*or us*.)

Name of applicant in full is

Residence and post office address is

The brand is for use in Township , Range

The fee of one dollar is herewith enclosed.

(Signature.)

SCHEDULE B.

To all whom the same may in anywise concern:

Take notice that I have this day sold (*number and description of animals sold*) to (*name of person*).

(Signature.)

Dated at

this day
of 19 .

NOTE: *Cattle brands as evidence.*

The above Act is of importance in connection with section 707 A of the Criminal Code of Canada.

That section, as amended in 1901, is as follows:—

707 A. "In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be prima facie evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of section 331 A respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval."

PROVINCE OF NOVA SCOTIA.

An Act to amend Chapter 20, Acts of 1902, entitled, An Act respecting the Maintenance and Reform of Juvenile Offenders.

(Statutes of Nova Scotia, 3 Edw. VII., chapter 28.)

[*Passed April 11th, 1903.*]

BE it enacted by the Governor, Council and Assembly, as follows:—

1. Section one of Chapter 20 of the Acts of 1902 is repealed, and the following substituted therefor:—

(1) Whenever any judge or stipendiary magistrate of any city or incorporated town shall sentence to imprisonment any boy or girl under the provisions of section 956 of the Criminal Code of Canada, to either the Halifax Industrial School or Saint Patrick's Home at Halifax, or the Monastery of the Good Shepherd at Halifax, or to any other reformatory institution for girls which may hereafter be recognized as such by order of the Lieutenant-Governor-in-Council, there shall be paid to the reformatory to which such boy or girl is sentenced the sum of one hundred dollars per annum for the support of such boy or girl. Sixty dollars of such amount shall be paid by the city, town or municipality in which such boy or girl has a settlement, and forty dollars shall be paid out of the provincial treasury of Nova Scotia. Such sum of sixty dollars shall constitute a charge upon the city, town or municipality in which such boy or girl has a settlement, and shall be provided for out of the ordinary revenues of such city, town or municipality.

2. Section two of said Act is amended by adding after the word "boy" in the second line, the words "or girl."

3. Section three of said Act is amended by adding after the word "boy" in the first line thereof, the words "or girl."

4. Section four of said Act is amended by adding after the word "boy" in the third line thereof, the words "or girl."

NOTE.—The Nova Scotia statute of 1902, which is amended by the foregoing Act, is printed in the Appendix to Vol. V., Canadian Criminal Cases, at page 563.

See also the Dominion statute, 2 Edw. VII., ch. 13, amending the Reformatory Prisons Act (Can.) with respect to the Halifax Industrial School and St. Patrick's Home at Halifax (5 Can. Cr. Cas. 560).

NORTH-WEST TERRITORIES.

An Ordinance respecting Foreign Companies.

(Territories Ordinances of 1903, chapter 14.)

[Assented to June 19th, 1903.]

THE Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the Territories enacts as follows:—

1. This Ordinance may be cited as "*The Foreign Companies Ordinance, 1903.*"

2. In the construction of this Ordinance and of any rules or forms made in pursuance thereof:—

1. "Foreign Company" shall mean any company or association incorporated otherwise than by or under the authority of an Ordinance of the Territories for the purpose of carrying on any business to which the legislative authority of the Legislative Assembly of the Territories extends;

2. "Registrar" shall mean registrar of joint stock companies and shall include a deputy registrar and an acting registrar;

3. "Charter" shall mean the Statute, Ordinance or other provision of law by or under which a foreign company is incorporated and any amendments thereto applying to such company, or

the memorandum of association or agreement or deed of settlement of the company or the letters patent or charter of incorporation or the license or certificate of registration of the company, as the case may be;

4. "Charter and regulations" shall mean the charter and the articles of association and all by-laws, rules and regulations of the company;

5. "Court" shall mean the Supreme Court of the North-West Territories;

6. "Judge" shall mean Judge of the said Court.

3. Unless otherwise provided by any Ordinance no foreign company having gain for its object or a part of its object, shall carry on any part of its business in the Territories unless it is duly registered under this Ordinance.

(2) Any unregistered foreign company carrying on business and any company, firm, broker or other person carrying on business as a representative or on behalf of such unregistered foreign company shall be liable on summary conviction to a penalty of \$50 for every day on which such business is carried on in contravention of this section and proof of compliance with the provisions of this section shall at all times be upon the accused.

(3) The taking orders for or the buying or selling goods, wares and merchandise by travellers or by correspondence if the company has no resident agent or representative and no warehouse, office or place of business in the Territories the onus of proving which shall in any prosecution under this section rest on the accused shall not be deemed to be carrying on business under the meaning of this Ordinance.

4. Any foreign company may become registered on compliance with the provisions of this Ordinance and on payment to the registrar of such fees as would be payable for registration under the provisions of *The Companies Ordinance*; and shall subject to the provisions of its charter and regulations and to the terms of the registration thereupon have the same powers and privileges in

the Territories as if incorporated under the provisions of *The Companies Ordinance*.

7. The certificate of registration or any copy thereof certified under the hand and seal of the registrar or a copy of the Gazette containing such certificate of registration shall be prima facie evidence of the due registration of the company as aforesaid.

An Ordinance to amend Chapter 22 of the Ordinances of 1900, intituled: "An Ordinance respecting Brands."

(Territories Ordinances of 1903, chapter 22.)

[Assented to June 19th, 1903.]

THE Lieutenant-Governor by and with the advice and consent of the Legislative Assembly of the Territories enacts as follows:—

1. Section 2 of *The Brand Ordinance* is hereby amended by adding thereto the following paragraph:—

"10. The expression 'character' means any sign, letter or numeral."

2. Section 4 of the said Ordinance is hereby repealed and the following substituted therefor:—

"4. Every brand for cattle allotted for the hip or thigh, for the ribs and for the shoulder or top of arm, shall consist of three characters and the shape and pattern of such characters and the arrangement thereof shall be fixed and determined by the commissioner."

NOTE: *Cattle brands*.

As to offences regarding cattle brands, see secs. 331 A and 707 A of the Criminal Code of Canada as amended in 1901.

PROVINCE OF QUEBEC.

An Act to amend the Law relating to Jurors.

(Quebec Statutes, 3 Edw. VII., chapter 28.)

[Assented to 25th April, 1903.]

HIS MAJESTY, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:—

1. The following article is inserted in the Revised Statutes after article 2657*d*, as enacted by the Act 54 Victoria, chapter 24, section 1:

“2657*e*. During any term or the adjournment of any term of the Court of King’s Bench, Crown side, the clerk of the Crown may, with the authorization of the Attorney-General, give, at least ten days previously, instructions to the sheriff to summon a new panel of grand jurors.”

2. This Act shall come into force on the day of its sanction.

PROVINCE OF ONTARIO.

The Ontario Summary Convictions Act.

Sections 7, 8 and 9 of the above Statute, R.S.O. 1897, ch. 90, were amended by the Statutes of 1901 (1 Edw. VII. ch. 13, sec. 2) and 1903 (3 Edw. VII. ch. 7, sec. 21) to read as follows:—

APPEALS TO GENERAL SESSIONS.

7. Any party who considers himself aggrieved by a conviction or order made by a Justice of the Peace, or by a Police or Stipendiary Magistrate, under the authority of any statute in force in Ontario, and relating to matters within the legislative authority of the Legislature of Ontario, or by an order dismis-

sing an information or complaint relating to any such matter, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the General Sessions of the Peace. R.S.O. 1887, ch. 74, sec. 4.

(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the Court of General Sessions of the Peace as herein provided would not afford an adequate remedy.

NOTE.—The amendment of the first part of this section consists in the addition of the words “or by an order dismissing an information or complaint relating to any such matter.” (3 Edw. VII., ch. 7, sec. 20.)

The word “order” where it appears in the phrase “aggrieved by a conviction or order” had been construed to mean an order against the party against whom the information and complaint had been laid, and as not including an order of dismissal. *Regina v. Toronto Public School Board* (1900), 31 Ont. R. 457.

The second sub-section was added by the statute of 1902, 2 Edw. VII., ch. 12, sec. 14.

By the latter statute (sec. 15) it was also enacted that—

“All the provisions of the Criminal Code, 1892, with respect to amendment of convictions or orders either on appeal or when removed by certiorari, and, subject to section 12 of the Ontario Summary Convictions Act, of any other Act of the Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any statute of this province or under any by-law passed by virtue of such authority.”

If, however, the conviction is made without jurisdiction, and is consequently ultra vires of the magistrate, certiorari will lie notwithstanding the above sub-section. *Re v. St. Pierre* (1902), 5 Can. Cr. Cas. 365, 4 O.L.R. 75.

8. In case an appeal lies to the General sessions of the Peace from a conviction or order made, as aforesaid, under the authority of a statute of the Legislature of Ontario or other statute or law in force in the Province of Ontario, and relating to matters within the legislative authority of the Legislature, the practice and proceedings on the appeal and preliminary thereto, and otherwise in respect thereof, including the practice and procedure as to the statement of a case for the opinion of the Court, save as is herein otherwise expressed, shall be the same as

the practice and proceedings under the statutes of the Dominion of Canada then in force, on an appeal to the General Sessions of the Peace from a conviction before a Justice of the Peace, made under the authority of a statute of Canada; except that either of the parties to the appeal may call witnesses and adduce evidence in addition to the witnesses called, and evidence adduced, at the original hearing. R.S.O. 1887, ch. 74, sec. 5.

NOTE.—The amendment made in 1901 to this section is by the insertion of the words “including the practice and procedure as to the statement of a case for the opinion of the court.” The practice as to “stated cases” is laid down in sec. 900 of the Criminal Code of Canada.

9. (1) Where an appeal lies to the General Sessions of the Peace from a conviction or order made by a Justice of the Peace, or by a Police or Stipendiary Magistrate, under the authority of any statute in force in Ontario, and relating to matters within the legislative authority of the Legislature of Ontario, the notice of appeal may be given within ten days after the conviction or order.

(2) If the conviction or order is made more than fourteen days before the sittings of the General Sessions, the appeal shall, at the latest, be made to the then next sittings of the Court, but if the conviction or order be made within fourteen days of the sittings of the Court, then to the second sittings next after the conviction or order. R.S.O. 1887, ch. 74, sec. 6.

(3) The appeal shall be heard by the Chairman of the Court of General Sessions without a jury, unless upon application of either party the Chairman shall otherwise order.

(4) The Chairman of the Court of General Sessions shall have power to hold a special sitting of the Court at such time as he may appoint for the hearing of any such appeal if the same is to be heard without a jury.

NOTE.—In the second sub-section the words “at the latest” were inserted by the statute of 1903 (3 Edw. VII., ch. 7, sec. 21).

By the same Act the new sub-sections numbered (3) and (4) were added.

PROVINCE OF ONTARIO.

An Act to regulate the Speed and Operation of Motor Vehicles
on Highways.

(Ontario Statutes, 3 Edw. VII., chapter 27.)

[Assented to 12th June, 1903.]

HIS MAJESTY, by and with the consent and advice of the
Legislative Assembly of the Province of Ontario, enacts as
follows:—

1. Whenever the term “motor vehicle” is used in this Act, it shall be construed to include automobiles, locomobiles, and all other vehicles propelled otherwise than by muscular power, excepting the cars of electric and steam railways, and other motor vehicles running only upon rails or tracks; but nothing in this Act contained shall be construed to apply to or affect bicycles, tricycles or such other vehicles as are propelled exclusively by muscular pedal power.

2. Every resident of this Province who is the owner of a motor vehicle, and every non-resident owner whose motor vehicle shall be driven in this Province, shall pay to the Provincial Secretary a registration fee of two dollars for each motor vehicle. The Provincial Secretary shall issue for each motor vehicle so registered a permit properly numbered, stating that such motor vehicle is registered in accordance with this section, and shall cause the name of such owner, with his address and the number of his permit, to be entered in a book to be kept for such purpose. This section shall not apply to manufacturers or dealers in this Province of motor vehicles, except as to vehicles kept by such manufacturer or such dealer for private use, or for hire.

3. Such permits shall be issued from the office of the Provincial Secretary, and shall be furnished to persons requiring the

same by such persons and subject to such conditions as the Lieutenant-Governor in Council shall name and appoint for that purpose.

4. The owner of each and every motor vehicle driving the same upon the public streets, public roads, parks or other public highways of this Province, shall carry and expose on said motor vehicle the permit issued as aforesaid by the Provincial Secretary, and he shall also have attached to or exposed upon the back of every such motor vehicle, in a conspicuous place, the number of said permit, so as to be plainly visible at all times during daylight, such number to be in plain figures not less than three inches in height.

5. Each and every motor vehicle shall be equipped and supplied with a proper alarm bell, gong or horn, and the same shall be sounded whenever it shall be reasonably necessary to be sounded for the purpose of notifying pedestrians or others of the approach of any such vehicle, and all such vehicles shall carry a lighted lamp, or lamps, in a conspicuous position in such vehicle whenever in motion in any street, alley or public way, at any time after dusk and before dawn, such light to display prominently the number of the permit issued as aforesaid by the Provincial Secretary.

6. No motor vehicle shall be run upon any public highway within any city, town or incorporated village, at a greater rate of speed than ten miles an hour, or upon any public highway outside of any city, town or incorporated village at a greater speed than fifteen miles per hour. Provided that the council of any city, town, township or village may by by-law set apart any public street or highway or any part thereof on which motor vehicles may be driven at any higher rate of speed than herein limited for the purpose of testing the same, and may pass by-laws for regulating and governing the use of any such street or highway or part thereof for the purposes aforesaid.

7. No person shall drive a motor vehicle upon any public street, highway, road, park, parkway or driveway in this Province in a race or on a bet or wager.

8. Every person having control or charge of a motor vehicle shall, whenever upon any public street or way and approaching any vehicle drawn by horse or horses, or any horse upon which any person is riding, operate, manage and control such motor vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses, and to insure the safety and protection of any person riding or driving the same. And if any such horse or horses appear frightened the person in control of such motor vehicle shall reduce its speed, and if requested by signal or otherwise by the driver of such horse or horses, shall not proceed further towards such animal, unless such movement be necessary to avoid accident or injury, or until such animal appears to be under the control of its rider or driver.

9. Upon approaching a crossing of intersecting ways, and also in traversing the crossing or intersection, or in crossing a bridge, the person in control of a motor vehicle shall run it at a rate of speed less than that specified, and not greater than is reasonable and proper, having regard to the traffic and use of the intersecting ways or bridge.

10. Any person violating any provision of this Act shall, for the first offence, incur a penalty not exceeding the sum of twenty-five dollars, and for the second or any subsequent offence shall incur a like penalty, or may be imprisoned for a term not exceeding one month. And the penalties hereby imposed shall be recoverable upon proceedings under *The Ontario Summary Convictions Act*.

11. No provisions in any by-law heretofore or hereafter passed under paragraph 7 of section 540 of *The Municipal Act* inconsistent with the provisions of this Act shall effect or apply to motor vehicles.

12. This Act shall take effect on, from and after the first day of September, 1903.

THE ONTARIO LOAN CORPORATIONS ACT.

Section 117 of this Act, R.S.O., 1897, ch. 205, was amended by the Statutes of 1900 (63 Vict. ch. 27, sec. 12) and 1903 (3 Edw. VII. ch. 16, sec. 9) to read as follows:—

UNREGISTERED LOAN CORPORATIONS PROHIBITED.

117.—(1) After the 31st day of December, 1897, no incorporated body or persons acting in its behalf, other than a corporation standing registered under this Act, and persons duly authorized by such registered corporation to act in its behalf, shall undertake or transact the business of a loan corporation in the Province, as such business is described in clause 5 of section 2 of this Act. In the case of any loan corporation whatsoever any setting up or exhibiting of a sign or inscription containing the name of the corporation, or any distribution or publication of any proposal, circular, card, advertisement printed form or like document in the name of the corporation, or any written or oral solicitation in the corporation's behalf, or any collecting or taking of money on account of shares or of loans or advances shall, both as to the corporation and as to the person acting or purporting to act in its behalf, be deemed undertaking the business of a loan corporation within the meaning of this section.

(2) If any promoter, organizer, office-bearer, manager, director, officer, collector, agent, employee, or person whatsoever, undertakes or transacts the business of a loan corporation which does not stand registered under this Act, he shall be guilty of an offence and upon summary conviction thereof before any Police or Stipendiary Magistrate or two Justices of the Peace having jurisdiction where the offence was committed shall be liable to a penalty not exceeding \$200 and costs, and not less than \$20 and costs; and in default of payment the offender shall be imprisoned with or without hard labour for a term not exceeding three months, and not less than one month; and on a second or any subsequent conviction he shall be imprisoned with hard labour

for a term not exceeding twelve months, and not less than three months.

(a) Any person, partnership, organization, society, association, company or corporation, not being a corporation registered under this Act or under *The Ontario Insurance Act*, that assumes or uses in the Province a name which includes any of the words "Loan," "Mortgage," "Trust," "Trusts," "Investment," or "Guarantee," in combination or connection with any of the words "Corporation," "Company," "Association" or "Society," or in combination or connection with any similar collective term, or that assumes or uses in the Province any similar name, or any name or combination of names which is likely to deceive or mislead the public, shall be guilty of an offence against subsection 1 of this section; and any person acting in behalf of such person, partnership, organization, society, association, company or corporation shall be guilty of an offence against sub-section 2 of this section, and upon conviction thereof shall be liable as in the said subsection 2 enacted; and subsections 3, 4, 5 and 6 of this section shall apply. This provision shall take effect on, from and after the first day of July, A.D., 1900. Provided that, where any of the said combinations of words formed part of the corporate name of any corporation theretofore duly incorporated by or under the authority of an Act of the Province or of the Parliament of Canada, the said combination may continue to be used in the Province as part of the said corporate name.

(3) Any one may be prosecutor or complainant under this Act; and one-half of any fine imposed by virtue of this Act shall, when received, belong to His Majesty, for the use of the Province, and the other half shall belong to the prosecutor or complainant.

(4) Any person convicted under this Act who gives notice of appeal against the decision shall be required before being released from custody to give to the Magistrate or Justices satis-

factory security for the amount of the penalty, and the costs of conviction and appeal; and the appeal shall be to a Divisional Court of the High Court.

(5) In any trial or cause or proceeding under this Act the burden of proving registry shall be upon the corporation or person charged.

(6) All informations or complaints for the prosecution of offences under this Act shall be laid or made in writing within one year after the commission of the offence. 60 Vict. ch. 38, sec. 117.

INDEX.

Abortion.

Drugs for procuring miscarriage—Unlawful advertisement—Proof of intent—When interpretation a question for the jury.

Upon a charge under Code sec. 179 (c) of knowingly, and without lawful excuse or justification, advertising a drug intended or represented as a means of causing abortion, the trial Judge may withdraw the case from the jury if the advertisement is incapable of such meaning, but if it be held to be capable it is then for the jury to decide whether or not it actually had such meaning, having regard to the context of the objectionable words and to the circumstances of the case.

The King v. Karn, 5 Can. Cr. Cas. 543, reversed.

THE KING v. KARN, (Ont.) 479

Acquittal.

Right of accused to demand certified record of acquittal—Fiat of Attorney-General unnecessary.

A person tried and acquitted in any criminal Court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to compel the delivery of certified copies or an exemplification thereof upon tender of the proper fees.

ATTORNEY-GENERAL v. SCULLY, (Ont. C.A.) 167

Adjudication.

See CONVICTION.

Admissibility.

See EVIDENCE.

Admissions.

See EVIDENCE.

Alien labour.

Knowingly assisting importation under contract—Omission to charge scienter—Invalidity not curable on certiorari—"Aliens or foreigners," meaning of.

(1) Where it appears upon a prosecution under the Alien Labour Statutes (1897 Can. ch. 11 and 1901 Can. ch. 13) that the workman was born in the United States, but that his father was born

in Canada and no evidence is given that either the workman or his father became United States citizens by naturalization, it is to be inferred that the workman is a British subject and not an alien or foreigner.

(2) The offence for which a summary conviction may be made under the said statutes is the "knowingly" assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service under contract made before the workman becomes a resident of Canada; and a conviction which does not recite that the alleged offence was done knowingly is bad as not disclosing an offence known to the law.

(3) The omission of the word "knowingly" from both the information and the conviction is a matter of substance and not a mere matter of form, and the defect is not curable upon certiorari as an "irregularity, informality or insufficiency" under Code sec. 889.

THE KING v. HAYES, (Ont.) 357

Note on meaning of "aliens."

362

Amendment.

See APPEAL; CERTIORARI; CONVICTION.

Appeal.

Leave to appeal—Judge's comment on prisoner's challenge of jurors—Instruction to jury—Impeachment of verdict.

(1) An objection to a trial and verdict on the ground that one of the jurors was not indifferent but had stated before the trial that if he were selected he would send the accused to gaol, raises a question of fact and not a question of law, and a Court of Criminal Appeal has no jurisdiction to grant leave to appeal in respect thereof under Code sec. 743.

(2) An objection to a verdict on the ground that it is against the weight of evidence can only be raised by obtaining leave from the trial Court under Code sec. 747 to apply to the Court of Appeal for a new trial.

(3) Where the trial Judge has refused to reserve a case upon a question of law and the Court of Appeal is then applied to for leave to appeal under Code sec. 744, leave cannot be granted in respect of another question of law in respect of which a reserved case had not been asked of the trial Judge.

(4) Where the trial Judge, after five jurors had been sworn, said to the prisoner's counsel in the hearing of the jurors composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause"—this is not misdirection or undue influence of the jury against the prisoner or his counsel, and leave to appeal should not be granted upon that ground.

(5) It is not misdirection for the trial Judge in charging the jury to say: "About forty or fifty witnesses have been examined for the purpose of establishing his (the prisoner's) good character; it is very strange that it should take forty or fifty witnesses to establish it"—if the statement as to the number of witnesses as to character is in fact correct.

THE KING v. CARLIN (No. 2), (Que.) 507

Leave to appeal to Supreme Court of Canada—Special leave only upon special grounds other than error.

Where an appeal lies from the Court of Appeal for Ontario to the Supreme Court of Canada, only where special leave is obtained from either of said Courts, leave should be refused unless special reasons are shewn apart from the alleged error in the decision sought to be reviewed. ATTORNEY-GENERAL v. SCULLY, (Can.) 381

Reserved case—Question reserved inapplicable to evidence—Quashing reserved case.

Where the sole question referred to the appellate Court on a case reserved has no bearing on the facts proved in evidence, the case should be quashed. THE QUEEN v. MCKAY, (N.S.) 151

Summary conviction—Joint appeal by several defendants—Recognizance—Two sureties essential.

(1) On a joint appeal, under sec. 879 of the Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellants, and the appeal will be quashed if the recognizance be given with only one surety.

(2) An appeal not being a common law right, the conditions precedent imposed by the statute must be strictly complied with.

(3) The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing and the conviction may be prosecuted as if no notice had been given.

THE QUEEN v. JOSEPH. (Que.) 144

Summary conviction—Immediate payment of fine—No right of appeal—Deposit in lieu of recognizance—Requisites of.

(1) A defendant fined in a summary conviction proceeding who thereupon pays the fine to the clerk of the Court instead of giving a recognizance or applying to the justice under Code sec. 880 (c) to fix the deposit on appeal, loses his right of appeal under secs. 879 and 880, notwithstanding that the magistrate afterwards fixed the amount of deposit for the costs only and such deposit was made and transmitted to the appellate Court with the conviction.

(2) The deposit authorized by Code sec. 880 (c) in lieu of a recognizance on appeal from a summary conviction must include the fine, and the whole sum covering both the fine and the probable costs of appeal must be transmitted to the appellate Court.

(3) *Semble*, the duty is upon the appellant to obtain the justice's return of such deposit to the appellate Court under Code sec. 888, and unless such return is made the appeal must be quashed.

THE KING v. NEUBERGER, (B.C.) 142

Summary conviction—Expediting the hearing.

An appeal from a summary conviction under the Liquor License Ordinance (N.W.T.) may, under Ordinance of 1901, ch. 33, sec. 21, before the first day of the sittings be expedited by the Judge appointed to take the sittings for which notice of appeal was given.

THE QUEEN v. McLEOD (No. 2), (N.W.T.) 94

Summary conviction—Requisites of notice of appeal—Describing the offence.

A notice of appeal from a summary conviction must state the name of the appellant, the intent to appeal, the nature of the conviction appealed against, and the sittings of the Court at which the appeal will be brought on.

A notice of appeal purporting to be from a conviction for "looking on" while another person was playing in a common gaming house is not a good notice of appeal from a conviction for "playing" in a common gaming house.

THE KING v. AH YIN (No. 1), (B.C.) 63

Summary conviction—Dismissal as not lodged in due form—Jurisdiction as to costs.

Where an appeal from a summary conviction is entered and prosecuted but is dismissed on the ground that it was not lodged in due form, there is no jurisdiction to award costs against the appellant.

Code sec. 884 only applies where the appellant fails to proceed with his appeal without abandoning it according to law.

THE KING v. AH YIN (No. 2), (B.C.) 66

Summary conviction under provincial law—Affidavit of merits—Jurisdiction.

The conditions, practice and procedure, in respect of appeals from summary convictions made under the laws enacted by the Legislative Assembly are those which that Assembly has prescribed, and an appeal cannot be heard unless all the statutory requirements imposed as conditions of the right of appeal have been complied with.

Where the Legislative Assembly has provided that the provisions of Part LVIII. of the Criminal Code shall apply to such appeals and has also enacted that no appeal shall lie unless an affidavit of merits be filed, the latter must be taken to be a condition precedent of the appeal in addition to those contained in Code sec. 880, notwithstanding the provision of Code sec. 881 that, when the requirements of Part LVIII. have been complied with, the Court shall try the appeal. **THE KING v. McLEOD, (N.W.T.)** 23

Summary conviction—Amendment of conviction on appeal—Costs of conveying to gaol—2 Edw. VII. (Ont.), ch. 12, sec. 15.

Where the costs and charges of conveying to gaol are imposed in case of non-payment of the fine under the "Ontario Summary Convictions Act," the amount thereof must be stated in the conviction; but a conviction improper in that respect may be amended under 2 Edw. VII. (Ont.), ch. 12, sec. 15, upon an appeal, by striking out the award of such costs.

COLLINS v. HORNING, (Ont.) 514

Notice of appeal; defects affecting jurisdiction; note. 57

Perfection of appeals; note. 146

Stated case—Application to magistrate after unsuccessful appeal from summary conviction—*Res judicata*.

(1) Where an appeal has been taken to a County Court under Crim. Code sec. 879 from a summary conviction and the County Court has affirmed the conviction, it is not open to the accused to afterwards have the convicting magistrate refer a "stated case" to a superior Court.

(2) The decision of the County Court being *res adjudicata* between the parties is a bar to the application for a "stated case."

THE KING v. TOWNSHEND (No. 2), (N.S.) 519

And see **RESERVED CASE; STATED CASE.**

Appeals.

Frauds in packing.

See **FRUIT MARKS ACT.**

Arrest.

False arrest—Issuing a warrant of arrest without inquiring into complainant's grounds.

A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant had to suspect the accused, becomes liable towards the latter under the laws of Quebec, when the complaint was not justified by any serious, reasonable or plausible ground.

MURFINA v. SAUVÉ, (Que.) 275

Assault.

Common assault—Limit of punishment upon summary trial—City stipendiary magistrate.

(1) Per Graham, E.J.—A city stipendiary magistrate holding a summary trial under Code sec. 785 may impose imprisonment not exceeding one year for common assault although Code sec. 265 specifies such punishment with the addition of the words "if convicted upon an indictment."

(2) Per Graham, E.J.—Section 785 gives to police and stipendiary magistrates of towns and cities the power to award on summary trials held with the consent of the accused, the same punishment as an Ontario Court of General Sessions might impose on a trial on indictment.

(3) Per Townshend, J.—Upon a summary trial for common assault, the imprisonment authorized by Code sec. 265 can only be imposed in the first instance; and where a fine is imposed the imprisonment in default of payment thereof is controlled by Code sec. 872 (b) and is therefore limited to three months.

THE KING v. HAWES, (N.S.) 238

Attorney-General.

Right of accused to demand certified record of acquittal—Fiat of Attorney-General unnecessary.

A person tried and acquitted in any criminal Court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to compel the delivery of certified copies or an exemplification thereof upon tender of the proper fees.

ATTORNEY-GENERAL v. SCULLY, (Ont. C.A.) 167

Bail.

Felony or misdemeanor before the Criminal Code—Distinction affecting right to bail.

(1) A person committed for trial in respect of an indictable offence which was a felony before the Criminal Code 1892 is not entitled as of right to bail and it is discretionary with the Superior Court exercising habeas corpus jurisdiction to allow or refuse bail in such cases.

(2) In determining whether or not bail should be granted, the probability of the party appearing for trial in case he is bailed is the principal consideration, and the question of guilt may properly be considered in determining the degree of such probability.

(3) Where the evidence upon which the committal was made raises a serious doubt as to the guilt of the accused, or if it stands indifferent whether the accused is guilty or innocent, an application for bail should be granted.

(4) With respect to indictable offences which were misdemeanors before the Criminal Code 1892, the accused committed for trial is entitled to bail as a matter of right on habeas corpus.

EX PARTE FORTIER, (Que.) 191

And see ESTREAT; RECOGNIZANCE.

Bawdy house.

See DISORDERLY HOUSE.

By-law.

See MUNICIPAL BY-LAWS.

Canada Evidence Act.

Communication made during marriage—Canada Evidence Act, 1893, sec. 4.

A wife, called as a witness against her husband, is incompetent under the Canada Evidence Act to disclose a communication made by her husband in the presence or hearing of herself and a third party which she will not undertake to say was not intended for her to hear.

THE KING V. WALLACE, (N.S.) 323

Canada Temperance Act.

Intoxicating liquor sent by express, c.o.d.—Passing of property—Delivery by express agent—Receipt of price.

Where intoxicating liquors are sold in a district where the Canada Temperance Act is not in force to be delivered by express c.o.d. at a place where the Act is in force, the express agent who makes the delivery and collects the price is not thereby guilty of the offence of selling contrary to the Act.

THE QUEEN V. CAHILL, (N.B.) 204

Illegal sale of intoxicating liquors; place of sale; appropriation of goods before delivery; note.

207

Case reserved.

See RESERVED CASE.

Certiorari.

Moneys received by magistrate under the conviction—Recovery after conviction quashed.

A justice of the peace, whose decision is attacked under a writ of certiorari, is an officer subject to coercive imprisonment, in the province of Quebec, for failure to deposit in Court, when ordered, all moneys received by him under the conviction.

MEBOIER V. PLAMONDON, (Que.) 223

Adjudication on facts involving the merits—Collateral facts.

Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject matter, the adjudication involved in the merits of the case, on the facts as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable on certiorari.

THE KING V. BEAGAN (No. 1), (N.S.) 54

Power of Superior Court in Province of Quebec.

The Superior Court in the Province of Quebec has certiorari jurisdiction over a conviction made by a justice of the peace in a criminal matter.

THE KING V. MERCIER, (Que.) 44

Omission to state time and place of offence—Reference to depositions on certiorari.

Where a perusal of the depositions returned on certiorari satisfies the Court that an offence was committed as stated in the conviction and of the date and place of same which had not been stated in the conviction, the irregularity in not stating such date and place is cured by Code sec. 889 unless an excessive punishment has been imposed by the magistrate.

THE KING V. LEWIS, (Ont.) 499

Omission to charge scienter—Invalidity not curable on certiorari
Crim. Code sec. 889.

The omission of the word "knowingly" from both the information and the conviction in a prosecution under the Alien Labour Statutes is a matter of substance and not a mere matter of form, and the defect is not curable upon certiorari as an "irregularity, informality or insufficiency" under Code sec. 889.

THE KING V. HAYES, (Ont.) 357

Preliminary objections to certiorari—Time for.

Preliminary objections to a writ of certiorari removing a conviction must be raised promptly, and objections to matters of form in the certiorari proceedings will not be entertained on the motion to quash the conviction when three months have elapsed since the return without a substantive motion being made to quash the writ.

THE QUEEN V. DAVIDSON, (N.W.T.) 117

Deposit of cash in lieu of recognizance.

Where a deposit of cash is made, under sec. 892 of the Code, or under N.W.T. Rule 13 of 1900, in lieu of a recognizance in certiorari proceedings to quash a summary conviction, it is not necessary that the applicant should file at the same time a written document setting forth the condition upon which the deposit is made.

THE QUEEN V. DAVIDSON, (N.W.T.) 117

Note on preliminary objections in certiorari proceedings.

122

Character.

See EVIDENCE.

Charge.

See JURY; INDICTMENT; INFORMATION; SPEEDY TRIAL.

Civil action.

Civil remedy for criminal act—Suspension of, until after criminal prosecution—Constitutionality of Code sec. 534.

(1) Section 534 of the Criminal Code, which provides that no civil remedy for any act or omission shall be suspended or affected by reason of the same amounting to a criminal offence, is not "criminal law" legislation but legislation dealing with civil rights and is ultra vires of the Federal Parliament.

(2) Semble, the establishment of the English criminal law by the Quebec Act (14 Geo. III. (Imp.) ch. 83) in the provinces of Ontario and Quebec having been effected by a legislative body having absolute jurisdiction over both civil and criminal law, it must be taken as having introduced in the Province of Quebec the English law with respect to the suspension of civil remedies for criminal wrongs.

PAQUET v. LAVOIE, (Que.) 314

Note on criminal law as affecting civil rights; Crim. Code sec. 534.

320

Clairvoyance.

See FORTUNE-TELLING.

Commission.

Evidence under commission—Witness resident out of Canada but temporarily therein.

An order may be made under Code sec. 683 for taking in Canada, under commission, the evidence of a material witness who ordinarily resides out of Canada, but who is temporarily within the jurisdiction and about to return to his own country.

THE KING v. BASKETT, (Ont.) 61

Foreign commission—Order for while preliminary enquiry pending—Practice.

(1) A commission to take evidence in a foreign country for use upon a prosecution for an indictable offence may be ordered under Code sec. 683 while the preliminary enquiry is pending.

(2) The evidence taken under commission is admissible as well at the preliminary enquiry as before the grand jury and at the trial of the indictment when found.

(3) The order should provide for the return of the commission into the Court from which it issues and should not direct a transmission of the evidence by the commissioner to the magistrate holding the preliminary enquiry.

THE QUEEN v. VERRAL, (Ont.) 325

Note on taking evidence under commission in a foreign country. 329

Commitment.

Note on essentials of a warrant of commitment. 3

And see CONVICTION; IMPRISONMENT.

Consent.

Consent of counsel in matter not affecting the Court's jurisdiction.

(1) At the trial of an indictable offence, the presiding Judge may with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom, and may order that the Court and jury proceed there for that purpose.

(2) The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the Court.

THE KING v. ROGERS, (N.B.) 419

Consent of prisoner or of his counsel in indictable offences; note. 421

Conspiracy.

Conspiracy to defraud—Employee disclosing employer's secrets for reward—Proof of intent.

(1) An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if neither the Crown nor the private prosecutor had definite information of the identity of the alleged co-conspirators.

(2) Where at the trial of such an indictment the name of one of the alleged co-conspirators is for the first time disclosed in the testimony of a Crown witness, that information may then be added to the statement of particulars of the indictment.

(3) It is a conspiracy to defraud a railway company for an employee of the audit office of the railway to agree with train conductors to sell to them secret information as to the time of special audits of passenger tickets on their trains, which information it was the duty of the accused as such employee to keep secret.

(4) The system of special audits on trains being designed to prevent the railway company being defrauded by irregularities not only on the train audited but on others, and being dependent for its effectiveness on the secrecy as to the time when it will take place, the disclosure of same for reward is evidence of

an attempt to cause the company a financial loss, although such disclosure tended to prevent any loss on the occasion when such audits took place **THE KING v. JOHNSTON, (Que.) 232**

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits.

Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co. by bribing clerk's in the company's employ to illegally and fraudulently disclose information of the secret audits to be made on trains and to furnish such information to conductors to enable them to be prepared for the audits when made and to be free at other times to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit they would communicate it to the conductor whose train was to be audited, for a purpose other than that of defrauding the company.

THE KING v. CARLIN (No. 1), (Que.) 365

Conspiracy to defraud—Bribery of railway clerks to disclose time of proposed train audits.

Upon a charge of conspiracy to defraud the Canadian Pacific Railway Co. by bribing clerks in the company's employ to illegally and fraudulently disclose information of the secret audits of trains to be made and to furnish such information to conductors to enable them to be prepared for the audits when made and at other times to be free to retain fares and to allow passengers to ride free or for a reduced fare, the Court properly rejected evidence of conductors to the effect that if they knew the date of a proposed secret audit they would communicate it to the conductor whose train was to be audited for a purpose other than that of defrauding the company. **THE KING v. CARLIN (No. 2), (Que.) 507**

Constable.

Enforcing invalid conviction—Protection of peace officer although he is prosecutor.

A peace officer executing a warrant of arrest which he believes to be good is exempt from criminal responsibility therefor by sec. 21 of the Criminal Code, although the warrant was bad on its face as following a conviction also bad on its face.

A constable is not disqualified from executing a warrant for enforcing a conviction for an offence under the Criminal Code, because of his having been the informant, nor does such fact disentitle him to the protection from civil action given to public officers by R.S.O. 1897, ch. 88.

GAUL v. TOWNSHIP OF ELLICE, (Ont.) 15

Negligent performance of duty—"Respondeat superior"—Liability of municipal corporation by which appointed.

A police officer is not the agent of the municipal corporation which appoints him to the position and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible for such negligence in provinces where the English common law applies.

MCCLEAVE v. CITY OF MONCTON, (Can.) 219
Constable informant; Whether disqualified from executing process in his own case; note. 21

Constitutional law.

Civil remedy for criminal act—Suspension of, until after criminal prosecution—Constitutionality of Code sec. 534.

(1) Section 534 of the Criminal Code, which provides that no civil remedy for any act or omission shall be suspended or affected by reason of the same amounting to a criminal offence, is not "criminal law" legislation but legislation dealing with civil rights and is ultra vires of the Federal Parliament.

(2) Semble, the establishment of the English criminal law by the Quebec Act (14 Geo. III. (Imp.) ch. 83) in the Provinces of Ontario and Quebec having been effected by a legislative body having absolute jurisdiction over both civil and criminal law, it must be taken as having introduced in the Province of Quebec the English law with respect to the suspension of civil remedies for criminal wrongs.

PAQUET v. LAVOIE, (Que.) 314

Liquor license law—Illegal sales by licensee, his servant, agent or employee—Statutory presumption—Interference with liberty of the subject.

(1) Where a liquor license law provides that "the person violating" the section thereof relating to sales by licensees during prohibited hours shall for a second or subsequent offence forfeit his license, the forfeiture will result although the offence stated in the prior conviction was not under the license for the same license term but under a previous license, which had since expired.

(2) Section 64, sub-sec. 5 of the Liquor License Ordinance (N.W.T.) is not ultra vires as constituting an undue interference with the liberty of the subject, although its effect may be to punish a license holder by imprisonment for illegal acts which have been committed by his servant, agent or employee, and which by virtue of the Ordinance are presumed to be the acts of the licensee.

THE QUEEN v. MCLEOD (No. 2), (N.W.T.) 94

Legislative power of province to confer judicial authority on county Judge outside of his county—Validity of reference to public vote to bring statute into force.

(1) The Ontario Legislature has power to enact as part of a statute respecting the sale of intoxicating liquors that a vote of the electors of the province shall be taken upon the question of bringing the Act into force, and that the restrictive part of the statute shall become operative only upon an affirmative vote of a stated proportion of the electors and upon a proclamation to be thereupon issued.

(2) The provisions contained in the Liquor Act (Ont.) 1902, for the designation of a county Judge to "conduct the trial" of persons accused of illegal acts in the taking of the vote of the electors and making the procedure of the Ontario Election Act applicable thereto constitutes the Judge selected thereunder a special Court to summarily try the offenders without the right to a trial by jury.

THE KING v. WALSH, (Ont.) 452

Provincial foreshore limits—Dominion Fishery license for exclusive rights invalid.

(1) The Dominion Government has no authority to demand a license fee from fishermen for the exclusive right to set nets or traps within certain limits of provincial foreshore waters, and sub-sec. 7 of sec. 14 of The Fisheries Act, R.S.C. 1886, ch. 95, is consequently *ultra vires*.

(2) The Dominion fishery officers have the right to regulate the kinds of nets and traps to be used in the provincial foreshores and to control the manner of fishing, but without compelling the payment of a license fee.

(3) A special statutory provision would be necessary to authorize the imposition by the Dominion of a license fee upon fishermen operating in provincial waters if imposed under the federal power of so raising a revenue for the general purposes of Canada.

THE KING v. CHANDLER, (N.S.) 308

Contempt of Court.

Newspaper comment—Newspaper proprietor commenting on prosecution of indictment against himself—Requiring security to refrain from further newspaper comment until case ended.

(1) Where the jury disagreed upon the trial of an indictment and a new jury was ordered for another sittings the cause is meanwhile still a pending one and improper and impartial comments thereon published by one of the accused will constitute a contempt of Court by him.

(2) The Court imposing sentence upon a newspaper proprietor for a contempt of Court contained in newspaper comment may, in addition to the infliction of a fine and imprisonment, require the accused to find sureties to keep the peace and to refrain from

publishing further articles reflecting on the pending cause, and may order imprisonment for six months, or until security is sooner given, or until the pending cause is sooner ended.

THE KING v. CHARLIER, (Que.) 486

Conviction.

One fine against persons jointly charged—Separate offences.

A summary conviction is invalid if it awards one fine against three persons for their separate acts.

GAUL v. TOWNSHIP OF ELLICE, (Ont.) 15

Duplicity—Cr. Code sec. 907.

A summary conviction for unlawfully distilling spirits and making or fermenting beer without a revenue license is not void as charging two offences, but is to be held to charge only one offence by virtue of Code sec. 907.

THE QUEEN v. JOSEPH McDONALD, (N.S.) 1

Two similar charges on different informations tried consecutively—Reserving judgment on first until evidence heard on second.

(1) Where a magistrate trying two charges against the same defendant for similar offences, reserved judgment in the first case until after the trial of the second, and then dismissed the first charge and convicted on the second, such conviction will not be set aside on certiorari if it is shewn that the magistrate was governed in each case solely by the evidence therein given.

(2) Semble, evidence would not be admissible to shew what operated on a Judge's mind with reference to the conduct of the trial, had such proceedings taken place at a "Speedy trial" before a County Court Judge.

THE KING v. SING, (B.C.) 156

Summary conviction—Immediate payment of fine—No right of appeal.

A defendant fined in a summary conviction proceeding who thereupon pays the fine to the clerk of the Court instead of giving a recognizance or applying to the justice under Code sec. 880 (c) to fix the deposit on appeal, loses his right of appeal under secs. 879 and 880, notwithstanding that the magistrate afterwards fixed the amount of deposit for the costs only and such deposit was made and transmitted to the appellate Court with the conviction.

THE KING v. NEUBERGER, (B.C.) 142

Note on variance between minute of adjudication and the conviction.

59

And see APPEAL; CERTIORARI; COSTS; IMPRISONMENT.

Corroboration.**See EVIDENCE.****Costs.****Enforcing invalid conviction.**

A resolution of a municipal council to pay the costs of enforcing an invalid conviction in a criminal matter is ultra vires.

GAUL V. TOWNSHIP OF ELLIOT, (Ont.) 15

Appeal from summary conviction—Dismissal as not lodged in due form—Jurisdiction as to costs.

Where an appeal from a summary conviction is entered and prosecuted but is dismissed on the ground that it was not lodged in due form, there is no jurisdiction to award costs against the appellant. Code sec. 884 only applies where the appellant fails to proceed with his appeal without abandoning it according to law.

THE KING V. AH YIN (No. 2), (B.C.) 66

Costs of distress and of conveying to gaol.

The costs of distress and of conveying to gaol are obligatory where a summary conviction imposes a fine and awards distress and imprisonment in default of distress, and therefore the omission of any reference to such costs in the minute of adjudication will not invalidate the formal conviction which includes them.

THE KING V. BEAGAN (No. 2), (N.S.) 56

In criminal libel. See LIBEL.**Criminal Code of Canada**

Section	4	68
	11	469
	14	486
	21	15
	31	15
	33	15
	92	446
	94	446
	95	446
	145	241, 424
	146	386
	173	39
	179	479
	187	196
	195	42, 463
	198	42, 224, 463
	199	63
	205	48
	207	44, 81, 147, 163, 223, 224
	227	104, 214
	231	214
	246	419
	265	238
	273	402

Criminal Code of Canada—Con.

290	486
305	209, 489
314	151
326	68
360	113
394	232, 365, 597
396	27
405	131
423	191
511	15
534	314
558	275
559	275
569	275
590	124
601	386
602	191
611	232
616	232, 241
617	232
645	295, 402
654	167, 381
656	295
661	348
668	365, 597
673	419
677	365, 419, 597
681	325, 419
683	61, 325
684	196
687	124, 419
699	135
700	135
726	167, 381
735	363, 365, 597
736	469
743	151, 363, 365, 386, 469, 479, 597
744	469, 479, 597
747	365, 597
752	399
765	406, 524
767	5, 406, 524
773	5, 386, 406
775	399
783	42, 224, 399
785	209, 238, 264, 463
786	209, 399
787	264
789	264
790	8, 12, 269
833	8, 12, 269
834	8, 12, 269
835	156
845	156
850	314
865	

Criminal Code of Canada—Con.

866	314
870	378
872	1, 56, 147, 238
879	94, 142, 144, 519
880	23, 63, 88, 94, 142, 144, 519
881	23, 66
883	66
884	66
886	1
888	142
889	54, 357, 499
890	54
892	117
893	88
900	351, 519
907	1
958	416
959	378, 416
971	224
973	224
980	15
982	63
Form WW	56
FFF	56
NNN	63
XXX	416

Crown counsel.

Right of reply—Counsel representing the Attorney-General.

(1) Where no evidence is offered for the defence, the defendant's counsel has the right to the last address to the jury notwithstanding that the prosecution is conducted by counsel acting for the Attorney-General.

(2) The "right of reply" permitted by Code sec. 661 to the Attorney-General, or to counsel acting on his behalf, is the right to again address the jury at the close of the evidence, and before the address of defendant's counsel, when the defence offers no evidence.

THE QUEEN V. LE BLANC, (Man.) 348

Right of reply of Crown counsel; Crim. Code sec. 661; note. 350

Depositions.

Full opportunity to cross-examine—Cross-examination not finished through illness of witness.

(1) Where the cross-examination of a witness for the prosecution upon a preliminary enquiry is interrupted by the illness of the witness, and the magistrate, in the absence of the accused and of his counsel, afterwards obtains the witness' signature to the depositions, but neither the witness nor the prisoner's counsel re-attends the enquiry to complete the cross-examination, there has

been no full opportunity to cross-examine so as to admit such depositions in evidence at the trial upon proof of the continued illness of the witness.

(2) There was no waiver of the right to continue the cross-examination by the failure of prisoner's counsel to attend on the adjourned inquiry when the witness was not present or by the prisoner himself stating thereat that he had nothing to say.

(3) A magistrate should not obtain a witness' signature to a deposition in the absence of the accused.

THE KING v. TREVANE, (Ont.) 124

Full opportunity to cross-examine; Cr. Code sec. 687; note. 129

Description of offence.

See CONVICTION.

Disorderly house.

Bawdy house—Occupation by or resort to by more than one female.

A female cannot be convicted of unlawfully keeping a bawdy house, unless it is shewn that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution.

THE KING v. YOUNG, (Man.) 42

Allowing girl under 18 to be on premises for immoral purposes—Cr. Code secs. 187, 684.

On a charge of allowing a girl under 18 to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there carried on, is sufficiently corroborated under Code sec. 684, by the evidence of another witness tending to shew that the place was a bawdy-house.

THE KING v. BRINDLEY, (N.S.) 196

Keeping bawdy-house—Describing the offence—Uncertainty—Omission of magistrate to state option of jury trial.

(1) Per Townshend, J.—After the accused consents to summary trial before a magistrate under Code sec. 786, it is not necessary for the magistrate to again “reduce the charge to writing” if that had been done before the consent was given, and it is sufficient for the magistrate to read to the accused the charge already written.

(2) Per Townshend, J.—A conviction by a magistrate on a summary trial for keeping a common bawdy-house need not specify the location of the house further than to shew that it was at a place within the jurisdiction of the Court.

(3) Per Townshend, J.—A conviction for keeping a common bawdy-house is sufficient without the addition of particulars shewing what part of the statutory definition given by the Code sec. 195 is the basis for the adjudication.

(4) Per Weatherbe, J.—Section 195 enlarges the meaning of the term “common bawdy-house,” and it is necessary that a conviction for keeping “a disorderly house, that is to say a bawdy-house,” should shew further particulars of the offence by specifying what was the subject of the keeping for purposes of prostitution, i.e., whether a “house,” “room,” “set of rooms” or other “place,” so as to come within the definition of sec. 195 referred to in sec. 198.

(5) Per Weatherbe, J.—A consent to “summary trial” under Code sec. 786 given to the magistrate without the option of a jury trial being expressly stated to the accused, is invalid and a prisoner held upon a conviction based upon such consent must be discharged upon habeas corpus. *THE KING v. SHEPHERD*, (N.S.) 463
Keeping a disorderly or bawdy-house; Cr. Code secs. 195, 198, 786; note. 467

Distilling.

See INLAND REVENUE.

Distress.

See COSTS.

Disturbance.

Of public meeting—Cr. Code sec. 173.

Section 173 of the Criminal Code, which declares it an offence to disturb, interrupt or disquiet any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, does not apply to a meeting of electors called by one of the candidates during a municipal election.

THE KING v. LAVOIE, (Que.) 39

Public meetings; preserving the peace; note. 41

Impeding passengers on street. See VAGRANCY.

Duplicity.

See CONVICTION.

Dying declaration.

Requisites—Declarant's belief in impending death—Want of hope of recovery.

To admit a dying declaration as evidence in a homicide case, the declarant must be under the solemn conviction that his death will within a proximately short time follow as the result of the wound, and he must have no hope whatever of recovery therefrom.

THE KING v. LAURIN (No. 4), (Que.) 104

Rejection of dying declarations; statements shewing declarant's hope of recovery; note. 111

Estreat.

Of recognizance to keep the peace—Stipendiary exercising “summary trial” powers must shew jurisdiction on face of recognizance.

(1) A recognizance to keep the peace for two years, being beyond the powers conferred upon justices by Code sec. 959 and only authorized to be taken by a stipendiary magistrate under certain circumstances and when exercising a power of “summary trial,” must shew on its face that the magistrate had jurisdiction to require it to be given, or its estreat will be refused.

(2) Where a stipendiary magistrate taking recognizance to keep the peace follows form XXX. of the Code without reference therein to any pending prosecution or to any obligation to appear in Court, it is to be assumed that he was proceeding in his capacity of a justice of the peace under Code sec. 959, to which alone that form is applicable, and if the term exceeds twelve months the recognizance is void.

RE SARAH SMITH'S BAIL, (N.S.) 416

Evidence.

Contradicting one's own witness—Other relevant testimony admissible although inconsistent—Witness hostile or adverse—Refreshing the memory.

(1) The party on whose behalf a witness is called is not debarred by Code sec. 699 from proving by other witnesses any relevant facts inconsistent with or contradictory of such witness's testimony without a ruling that the witness is hostile to the party calling him.

(2) The witness's deposition at the preliminary enquiry may be shewn to him on his examination in chief at the trial for the purpose of refreshing his memory, but neither the examining counsel nor the witness may read the deposition aloud.

(3) On the witness, silently reading his previous deposition, a question, which had been put to the witness before he saw the deposition, and to which he had given an unexpected answer, may be re-put; and only in case the witness, after his memory has been so refreshed, persists in the same unexpected answer, can the question be repeated to him in a leading form from the depositions.

(4) The opposite party is entitled to cross-examine not only upon the examination in chief but upon the previous depositions which had been so shewn to the witness for the purpose of refreshing his memory.

THE KING V. LAURIN (No. 5), (Que.) 135

Corroboration—Prostitution—Cr. Code secs. 187, 684.

On a charge of allowing a girl under 18 to be upon premises for immoral purposes, the evidence of the girl proving that she shared with the proprietor the money she obtained by prostitution there

carried on, is sufficiently corroborated under Code sec. 684, by the evidence of another witness tending to shew that the place was a bawdy-house.

THE KING V. BRINDLEY, (N.S.) 196

Wife as witness against her husband—Husband's statement made in presence of wife and another.

A wife, called as a witness against her husband, is incompetent under the Canada Evidence Act to disclose a communication made by her husband in the presence or hearing of herself and a third party which she will not undertake to say was not intended for her to hear.

THE KING V. WALLACE, (N.S.) 323

Corroboration required under Cr. Code sec. 684; note.

200

Commission to take. See COMMISSION.

Exhibitions.

Agricultural fairs—Exhibition prizes—Horse racing—Classification—Fraudulent entry—Ontario statute respecting.

(1) The Ontario statute respecting the fraudulent entry of horses at exhibitions is one regulating the rights between individuals by preventing unfair competition, and is intra vires of the provincial legislature.

(2) The statute applies whether or not the horse entered at the exhibition has a previous "record" of speed or not, and a classification of the horses by their age is within the Act.

COLLINS V. HORNING, (Ont.) 514

Extortion.

Extortion by threats—Separate civil claim.

Where the prisoner is being tried on a charge of having, with intent to extort money, accused or threatened to accuse a physician of having procured an abortion on the prisoner's wife, the evidence for the prosecution being to the effect that the demand for the money was on a claim of seduction as well as abortion, and the defence claiming that the demand was in respect of the seduction only, evidence is not admissible on behalf of the defence to prove that the charge of seduction was true.

THE KING V. WARREN WILSON, (Ont.) 131

Threatening to accuse with intent to extort; truth of charge; Cr. Code sec. 405; note.

133

Extradition.

Laying information in extradition or proving foreign warrant of arrest—Alternative procedure—Foreign warrant must be in full force.

(1) An extradition Judge may issue a warrant for apprehension either upon a complaint laid before himself or upon proof of a foreign warrant of arrest, but, in the latter case, the original must be produced and it must appear that it is still in force.

(2) An authenticated copy of a foreign bench warrant, and of a return thereto that the accused could not be found within the jurisdiction of the sheriff, is insufficient proof of a warrant outstanding and in full force, unless there be evidence of a valid re-issue of such foreign warrant.

(3) An extradition Judge has no jurisdiction to issue a warrant for apprehension without an information or complaint laid before him or proof made of a valid outstanding foreign warrant; nor does jurisdiction attach upon the appearance before him of the accused under arrest upon a warrant improperly issued without such requirements having been complied with.

IN RE BONGARD, (N.W.T.) 74

Note on the Canadian Extradition Act of 1886.

80

False pretences.

Valuable security—Lien note.

A lien note is a "valuable security" within the meaning of sec. 360 of the Criminal Code.

THE KING v. WAGNER, (N.W.T.) 113

Fine.

See APPEAL; CONVICTION; IMPRISONMENT.

Fisheries.

Provincial foreshore limits—Dominion license for exclusive rights invalid—Federal regulation of fisheries—"Trap net" defined.

(1) A fishing net having the usual accessories of a trap net, except that it has not a twine floor or bottom, is none the less a "trap net" within the meaning of The Fisheries Act (Can.).

(2) The Dominion Government has no authority to demand a license fee from fishermen for the exclusive right to set nets or traps within certain limits of provincial foreshore waters, and sub-sec. 7 of sec. 14 of The Fisheries Act, R.S.C. 1886, ch. 95, is consequently ultra vires.

(3) The Dominion fishery officers have the right to regulate the kinds of nets and traps to be used in the provincial foreshores and to control the manner of fishing, but without compelling the payment of a license fee.

(4) A special statutory provision would be necessary to authorize the imposition by the Dominion of a license fee upon fishermen operating in provincial waters if imposed under the federal power of so raising a revenue for the general purposes of Canada.

THE KING v. CHANDLER, (N.S.) 308

Fortune telling.

Written application—Contract negating intent to deceive.

Where on a prosecution for undertaking to tell fortunes, it appears that the prediction of the future for which payment was made was expressly stipulated to be only a delineation made pursuant to rules laid down in published works on palmistry, etc., an acquittal should be directed, as the contract negatives any intention to deceive.

THE KING v. CHILCOTT, (Ont.) 27

Fraud.

See FALSE PRETENCES.

Fruit Marks Act.

Apples fraudulently packed—Having in possession for sale—Mens rea—"Faced surface," meaning of.

(1) It is an offence against the Fruit Marks Act to have in possession for purposes of sale apples packed so that more than 15 per cent. of the contents of the barrel is substantially inferior in grade to the faced surface, although the sale actually made was to a purchaser who inspected the bulk and consequently was not defrauded.

(2) It is not essential to the offence that there should be a fraudulent intent on the part of the accused.

(3) Semble, the offence is complete although the accused neither knew of the fraudulent packing nor was negligently ignorant of it.

THE KING v. JAMES, (Ont.) 159

Gaming.

Looking on in common gaming house—Cr. Code sec. 199.

A notice of appeal purporting to be from a summary conviction for "looking on" while another person was playing in a common gaming house is not a good notice of appeal from a conviction for "playing" in a common gaming house.

THE KING v. AH YIN (No. 1), (B.C.) 63

Grain laws.

Grain shipment—Allotment of railway cars—Statutory regulations in Manitoba and N.W.T.—Manitoba Grain Act, 1900 (Can.).

A railway station agent within the Inspection District of Manitoba to which the Manitoba Grain Act, 1900 (Can.), applies, is guilty of an infraction of that statute if he allots cars to the elevator companies having grain elevators at a shipping point in preference to the unfilled prior order of a private applicant for a single car duly entered in the order book pursuant to sec. 58 of that Act.

THE KING v. BENOIT, (N.W.T.) 351

Grand Jury.

Procedure on swearing in the grand jurors—All jurors to be impanelled when foreman sworn.

The swearing in of a grand jury should take place after its members are duly impanelled; and the foreman's oath should be sworn in the presence of the other grand jurors, they being afterwards sworn to observe the same oath.

Where the grand jurors were called and answered to their names and then the juror selected as foreman was impanelled alone and sworn, after which the other jurors were called from amongst the spectators to the box and were sworn to observe their foreman's oath, their proceedings are invalid and an indictment found by them should be quashed on motion.

THE KING V. BELANGER, (Que.) 295

Swearing witnesses before; note. 306

What evidence receivable before; note. 306

Initialing names of witnesses sworn; note. 404

Habeas corpus.

Jurisdiction of County Court Judge in Nova Scotia—Costs against informant.

A person made a respondent to an application for a habeas corpus in a criminal matter who does not appear of record to be the prosecutor, and who does not appear on the application, is not liable in Nova Scotia for costs on the discharge of the prisoner in the habeas corpus proceedings, although the conviction in question was for stealing his property.

Quaere, whether a County Court Judge in Nova Scotia has power as a master of the Supreme Court to entertain habeas corpus applications.

THE QUEEN V. BOWERS, (N.S.) 100

Jurisdiction in Province of Quebec—Judicial districts.

(1) In the Province of Quebec, when there is a Judge duly authorized then within the limits of the judicial district in which the applicant for a writ of habeas corpus is imprisoned on a criminal charge, a Judge sitting in another district has no jurisdiction to entertain the application even on the consent of the Crown.

(2) The Court of King's Bench sitting in appeal either at Montreal or Quebec has jurisdiction to grant a writ of habeas corpus in respect of a prisoner confined in any district within the division for which the sittings are being held.

EX PARTE TREMBLAY, (Que.) 147

Return—Two warrants of commitment for same offence.

Where a return to a writ of habeas corpus, or to an order of the nature of such writ, specifies two warrants of commitment for the

same offence, and neither the second warrant nor such return declares the second warrant to be in substitution for or in amendment of the first which is irregular and bad, the prisoner should be discharged. THE KING V. VENOT, (N.S.) 209

Practice in habeas corpus proceedings; note. 212

Highway.

Sidewalk—Obstruction—Marching in procession—Impeding free passage of foot passengers—Nova Scotia Towns Incorporation Act, 1895.

Where a body of sixty students marched upon a sidewalk in files of four with arms linked, any of them may be properly convicted of an offence against a municipal by-law prohibiting "walking or marching in a group or near to each other on the sidewalk so as to obstruct a free passage for foot passengers," although sufficient space remained for persons walking in single file to pass them.

THE QUEEN V. YATES, (N.S.) 282

"Salvation Army"—Obstruction of street.

(1) There is no legal right at common law for persons to assemble in any numbers upon a highway and to remain assembled there as long as they please to the detriment of others having equal rights of passage over the highway.

(2) An assembly of a moral and religious character, ex. gr. the Salvation Army, is subject to the same rule, and members thereof who hold a religious service on a town street and thereby collect a crowd which blocks the free passage of the street are properly convicted under a statute prohibiting persons from standing in a group or near to each other on the street so as to obstruct a free passage for carriages, etc.

THE QUEEN V. WATSON, (N.S.) 331

Religious gatherings on streets and highways; note. 338

House of ill-fame.

See DISORDERLY HOUSE.

Husband and wife.

Non-support of wife—"Wilfully refusing or neglecting to maintain"—Reasonable ground for believing that liability had terminated.

(1) To constitute a wilful refusal or neglect by a husband to maintain his wife (Cr. Code sec. 207), there must be an absence of any reasonable ground for believing the refusal or neglect to be lawful.

(2) A husband who has been ordered by a civil Court in an action brought by his wife for separation to pay to his wife an interim

alimentary allowance is relieved from that liability in the Province of Quebec on proof that the wife is supporting herself by immorality, and a criminal prosecution against him for non-support will be dismissed on the like proof.

ANONYMOUS CASE (H— v. H—), (Que.) 165

Imprisonment.

Privilege of release on paying fine—Computation of time.

The term of imprisonment under a summary conviction of a person not then in custody commences from the date of his arrest under the warrant of commitment.

It is sufficient that the warrant of commitment states only the length of time for which imprisonment was adjudged, without specifying that the term of imprisonment shall date from the arrest.

Where a summary conviction imposed both imprisonment and fine, and in default of payment of the latter, a further detention for a fixed term unless the fine were sooner paid, the omission from the warrant of commitment of the latter proviso as to payment during the term is a defect which is cured by Code sec. 886, and the warrant is valid.

THE QUEEN v. JOSEPH McDONALD, (N.S.) 1

And see BAIL; CONVICTION; COSTS; HABEAS CORPUS.

Indictment.

Bill of indictment—Initialling witnesses' names endorsed, when sworn—Depositions at preliminary enquiry—Use of before grand jury.

(1) Section 645 of the Criminal Code which requires that the foreman of a grand jury shall initiate upon the bill of indictment the names of the witnesses examined before the grand jury is imperative and not merely directory, and the failure to observe it is good ground for quashing the indictment. (Court of K.B.).

(2) Depositions taken at the preliminary enquiry can only be read to a grand jury in cases where such depositions can be used as evidence before a petit jury. (Wurtele, J.).

THE KING v. BELANGER, (Que.) 295

Failure to endorse every name of witness—Remitting bill of indictment to grand jury to endorse names of additional witnesses.

(1) The omission to endorse upon the bill of indictment the names of witnesses summoned by the grand jury of its own motion, does not invalidate the indictment, but the Court may send for the grand jury and direct that the names of such additional witnesses be endorsed and initialled so that the accused may have notice upon whose testimony a true bill had been found.

(2) The provision contained in sec. 645 of the Criminal Code requiring that the name of every witness examined or intended to be examined shall be endorsed upon the bill of indictment, is directory only and not imperative. *THE KING v. HOLMES*, (B.C.) 402
 Grand jury; Initialling names of witnesses endorsed on bill of indictment; Cr. Code sec. 645; note. 404
 And see *APPEAL*; *GRAND JURY*; *JURY*; *MURDER*; *RESERVED CASE*.

Informant.

When constable is also informant. See *CONSTABLE*.

Information.

Statute requiring sworn information—Amended information not re-sworn—Waiver by accused.

Where the accused was brought before a justice to answer a charge under an Ontario statute which requires an information on oath, and the justice thereupon amended the sworn information in the presence of the informant and gave notice to the accused that he would be tried on the amended information, the fact that the information had not been re-sworn after the amendment will not invalidate the proceedings if no objection was then taken by the accused. *THE KING v. LEWIS*, (Ont.) 499

And see *CERTIORARI*; *CONSTABLE*; *CONVICTION*; *DISORDERLY HOUSE*.

Inland Revenue.

Distilling spirits and fermenting beer one offence.

A summary conviction for unlawfully distilling spirits and making or fermenting beer without a revenue license is not void as charging two offences, but it is to be held to charge only one offence by virtue of Code sec. 907.

THE QUEEN v. JOSEPH McDONALD, (N.S.) 1

Unlawful possession of "still" or rectifying apparatus.

Under sec. 159 of the Inland Revenue Act, R.S.C. 1886, ch. 34, as amended 1898, ch. 27, it is an offence to have possession of a "still" without the notice or registration provided by the Act, even though such possession be that of a carrier only.

The phrase "in any place" used in sub-sec. (e) of sec. 159 is equivalent to the word "anywhere," and the context does not limit its meaning to distilleries or places used as distilleries.

THE KING v. BRENNAN; *THE KING v. KENNEDY*, (N.S.) 29

Insanity.

Theft—Plea of insanity—Instruction that no evidence in support—Question of law.

A case may be reserved at the instance of the Crown upon a question of law as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground.

THE KING v. PHINNEY (No. 1). (N.S.) 469

Instruction to jury.

See JURY.

Intent.

See CERTIORARI; CONSPIRACY; CONVICTION; FORTUNE-TELLING.

Joint indictment.

See MURDER.

Jurisdiction.

Appeal from conviction—Affidavit negating guilt—Statutory requisites—Waiver.

(1) A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the justice who tried the cause that he did not, by himself or otherwise, commit the offence, is not ultra vires of the Legislative Assembly.

(2) Such enactment is not inconsistent with sec. 880 of the Criminal Code, made applicable to the Territories by the North-West Territories Act.

(3) The omission to make such affidavit within the time prescribed deprives the Court to which the appeal is given of jurisdiction, and such omission cannot be waived so as to confer jurisdiction.

CAVANAGH V. MCILMOYLE, (N.W.T.) 88

Note on effect of acquiescence in jurisdiction.

92

And see APPEAL; CERTIORARI; CONVICTION; COSTS; HABEAS CORPUS.

Jury.

Instruction to jury as to recommending to mercy—Discretion.

It is not irregular for the Judge at a trial by jury to inform the jury that if they find the prisoner guilty they may also, if they see fit, recommend the prisoner to the mercy of the Court.

THE KING V. JOHNSTON, (Que.) 232

Evidence of juror inadmissible to contradict formal assent.

On an application for a reserved case the evidence of a juror is not admissible to shew that he and another juror had refused to agree with the opinion of the other ten jurors, and had failed to object on the recording of the verdict favoured by the ten because some of the latter had told them that the agreement of ten was sufficient to carry the verdict.

THE KING V. MULLEN, (Ont.) 363

Judge's comment on prisoner's challenge of jurors—Instruction to jury—Affidavit of juror to impeach verdict.

(1) Where the trial Judge, after five jurors had been sworn, said to prisoner's counsel in the hearing of the jurors composing the panel: "If you continue to challenge every man who reads the newspapers, we will have the most ignorant jurors selected for the trial of this cause"—this is not a question of law which can be reserved but is a matter of an irregularity which might entail the annulling of the verdict if it were of a nature to unduly prejudice the jury against the accused. The remark complained of could not do so as it indicated no opinion for or against the prisoner.

(2) Where the trial Judge in charging the jury said: "About forty or fifty witnesses have been examined for the purpose of establishing his (the prisoner's) good character; it is very strange that it should take forty or fifty witnesses to establish it"—this was not a matter of law upon which a case could be reserved for the Court of Appeal, nor is it a ground for impeaching the verdict.

(3) The fact that a juror has made remarks indicating a leaning for or against an accused will not of itself furnish ground for a new trial where the verdict does justice and there is no reason to suppose that the juror's opinion was not derived from the evidence.

(4) Where a juror has been challenged for favour the finding of the triers as to his competency is conclusive, although the accused and his counsel were not then aware of remarks alleged to have been made by the juror which would tend to shew a bias against the prisoner.

(5) Upon grounds of public policy the testimony or the affidavit or other sworn statement of a juror will not be received to impeach a verdict, nor to shew that the jurors agreed on their verdict by a majority.

THE KING v. CARLIN (No. 1), (Que.) 365

And see APPEAL; EVIDENCE; RESERVED CASE.

Keeping the peace.

Finding sureties to keep the peace—Costs ordered against defendant—Imprisonment for non-payment only authorized in default of distress.

Upon a proceeding under sec. 959 of the Criminal Code to compel the giving of a recognizance to keep the peace, the recovery of costs ordered against the defendant is governed by Code sec. 870 and imprisonment for non-payment is only authorized in default of distress.

THE KING v. POWER, (N.S.) 378

Recognizance to keep the peace—When and by whom two years' term may be required—Jurisdiction on face of recognizance.

(1) A recognizance to keep the peace for two years, being beyond the powers conferred upon justices by Code sec. 959 and only authorized to be taken by a stipendiary magistrate under certain

Instruction to jury.

See JURY.

Intent.

See CERTIORARI; CONSPIRACY; CONVICTION; FORTUNE-TELLING.

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Finding sureties to keep the peace—Costs ordered against defendant—Imprisonment for non-payment only authorized in default of distress.

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Recognizance to keep the peace—When and by whom two years' term may be required—Jurisdiction on face of recognizance.

(1) A recognizance to keep the peace for two years, being beyond the powers conferred upon justices by Code sec. 959 and only authorized to be taken by a stipendiary magistrate under certain

circumstances and when exercising a power of "summary trial," must shew on its face that the magistrate had jurisdiction to require it to be given, or its estreat will be refused.

(2) Where a stipendiary magistrate taking a recognizance to keep the peace follows form XXX. of the Code without reference therein to any pending prosecution or to any obligation to appear in Court, it is to be assumed that he was proceeding in his capacity of a justice of the peace under Code sec. 959, to which alone that form is applicable, and if the term exceeds twelve months the recognizance is void.

RE SARAH SMITH'S BAIL, (N.S.) 416

Costs on finding sureties to keep the peace—Cr. Code sec. 959; note.

380

Larceny.

See THEFT.

Libel.

Criminal libel—Commission evidence—Abortive trials—Costs.

In British Columbia, following the practice there in civil cases, the costs of taking evidence under commission abroad on behalf of the defendant in a prosecution for criminal libel cannot be taxed against the prosecutor unless such evidence was used at the trial. In British Columbia, following the practice there in civil cases, the costs of abortive trials of an indictment for criminal libel cannot be taxed under Cr. Code secs. 833 and 835, against the party who ultimately fails in the litigation.

THE KING v. NICHOL, (B.C.)

8

Costs—Taxation or action for.

Where the accused, after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial Judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs, the civil action will be allowed to proceed only on terms of the plaintiff undertaking to abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case.

NICHOL v. POOLEY (No. 1), (B.C.)

12

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abide by such order as may be made therein as to the costs of the abandoned taxation in the criminal case.

NICHOL V. POOLEY (No. 2), (B.C.) 269

License.

See LIQUOR LICENSE; MUNICIPAL BY-LAWS.

Liquor Act 1902 (Ont.)

Special Court to try balloting offences—Adjournment for sentence.

(1) The Ontario Legislature has power to enact as part of a statute respecting the sale of intoxicating liquors that a vote of the electors of the province shall be taken upon the question of bringing the Act into force, and that the restrictive part of the statute shall become operative only upon an affirmative vote of a stated proportion of the electors and upon a proclamation to be thereupon issued.

(2) The provision contained in the Liquor Act (Ont.) 1902, for the designation of a county Judge to "conduct the trial" of persons accused of illegal acts in the taking of the vote of the electors and making the procedure of the Ontario Election Act applicable thereto constitutes the Judge selected thereunder a special Court to summarily try the offenders without the right to a trial by jury.

(3) A county Judge duly designated and acting under the Liquor Act (Ont.) 1902, may, after finding the accused guilty, adjourn the Court to a later date for the purpose of passing sentence upon him.

(4) Such Judge may issue the preliminary process in a prosecution under that statute in the county for which he holds his judicial commission and may hold the trial in another county.

THE KING V. WALSH, (Ont.) 452

Liquor license.

Liquor License Ordinance—Appeal from conviction—Affidavit negating guilt—Statutory requisites—Jurisdiction.

(1) A Territorial Ordinance enacting that no appeal shall lie from a conviction under a Territorial Ordinance unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the justice who tried the cause that he did not, by himself or otherwise, commit the offence, is not ultra vires of the Legislative Assembly.

(2) Such enactment is not inconsistent with sec. 880 of the Criminal Code, made applicable to the Territories by the North-West Territories Act.

(3) The omission to make such affidavit within the time prescribed deprives the Court to which the appeal is given of jurisdiction, and such omission cannot be waived so as to confer jurisdiction.

CAVANAGH V. McILMOYLE, (N.W.T.) 88

Illegal sales by licensee, his servant, agent or employee—Statutory presumption.

(1) Where a liquor license law provides that "the person violating" the section thereof relating to sales by licensees during prohibited hours shall for a second or subsequent offence forfeit his license, the forfeiture will result although the offence stated in the prior conviction was not under the license for the same license term but under a previous license, which had since expired.

(2) Section 64, sub-sec. 5 of the Liquor License Ordinance (N.W.T.) is not ultra vires as constituting an undue interference with the liberty of the subject, although its effect may be to punish a license holder by imprisonment for illegal acts which have been committed by his servant, agent or employee, and which by virtue of the Ordinance are presumed to be the acts of the licensee.

(3) An appeal from a summary conviction under the Liquor License Ordinance (N.W.T.) may, under Ordinance of 1901, ch. 33, sec. 21, before the first day of the sittings be expedited by the Judge appointed to take the sittings for which notice of appeal was given.

THE QUEEN V. McLEOD, (N.W.T.) 94

Keeping bar open during prohibited hours—Proof of accused being a licensee.

Where the information does not allege that the defendant was a licensee, nor was proof adduced of the fact, a conviction for selling liquor during prohibited hours will be set aside.

THE QUEEN V. DAVIDSON, (N.W.T.) 117

Saloons—Hotel bar-rooms—Sunday closing.

(1) A municipality has no power under sec. 50, sub-secs. 109 and 110, of the Municipal Clauses Act of British Columbia to pass a by-law closing any kind of licensed premises, except saloons.

(2) A municipality is not empowered, by sec. 7 of the Liquor Traffic Regulation Act (B.C.) to pass any closing by-law, the intention of the section being to prohibit the sale, inter alia, during such hours as may be prescribed by the municipality under the authority of some other statute.

(3) Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad. HAYES V. THOMPSON, (B.C.) 227

Liquor License Ordinance (N.W.T.)—Forfeiture of license on second offence; note. 99

Illegal sale of intoxicating liquors; place of sale; appropriation of goods before delivery; note. 207

Lotteries.

Prize dependent upon chance without skill—Illusory condition.

Where tickets for a drawing by lot are sold as part of a scheme for the disposal of goods, and the holder of the winning ticket is

required by the conditions of the drawing to shoot a turkey at fifty yards in five shots in order to win the prize, such circumstance does not necessarily take the case outside of the lottery sections of the Criminal Code.

It is a question for the jury whether such condition was imposed as a contest of skill, or as a mere pretence in evasion of the lottery law.

Where the evidence shews that any person could easily comply with the condition and the jury found the advertiser of the scheme guilty of advertising a lottery, the verdict will be supported as, in effect, finding that there was no real element of skill involved in the condition.

THE KING v. JOHNSON, (Man.) 48

Lottery offences; note.

52

Magistrate.

See ARREST; CERTIORARI; CONVICTION; STATED CASE.

Malicious prosecution.

Certifying record of acquittal for use in action for malicious prosecution; note.

189

Manitoba Grain Act.

See GRAIN LAWS.

Master and servant.

Frauds on employers; obtaining advance of transportation charges; failure to refund; Ontario Master and Servant Act; note.

503

Merchandise marks.

See FRUIT MARKS ACT.

Misdirection.

See APPEAL.

Municipal by-laws.

B.C. Municipal Clauses Act—Sunday observance by-law—Validity of.

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Sunday observance—Montreal city by-law as to petty trading—By-law invalid for unreasonableness.

Montreal City By-law, No. 281, permitting the sale on Sunday of "fruits, cigars, confectionery and temperance beverages" by all persons who sell all these things and are not engaged in trade is invalid as arbitrary and unjust because it does not authorize the sale of tobacco as well as cigars, and because it does not extend to all persons who are engaged in the same business.

CITY OF MONTREAL V. FORTIER, (Que.) 340

Murder.

Complicity of two persons jointly indicted—Plea of guilty by one prisoner—Acquittal of other prisoner on plea of not guilty—Subsequent application to change plea of "guilty" to "not guilty."

Where two persons are jointly indicted for murder and one pleads guilty and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted the other defendant to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal already given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty.

THE KING V. HERBERT, (Ont.) 214

New trial.

See APPEAL; RESERVED CASE.

Notice of appeal.

See APPEAL.

Obstruction.

Of highway. See HIGHWAY.

Packing of apples.

See FRUIT MARKS ACT.

Palmistry.

See FORTUNE-TELLING.

Peace officer.

See CONSTABLE; MAGISTRATE.

Perjury.

False oath made before de facto legal tribunal—Magistrate incompetent under special statute under which charge is laid.

It is perjury under sec. 145 of the Criminal Code to give false testimony before a justice of the peace holding a judicial proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place.

DREW V. THE KING (No. 1), (Que.) 241

False oath made before *de facto* legal tribunal—Magistrate incompetent under special statute under which charge is laid.

It is perjury under sec. 145 of the Criminal Code to give false testimony before a justice of the peace holding a judgment proceeding under a provincial law, although the justice was by the terms of that law disqualified from hearing the charge because he was not a resident of the county in which the alleged offence took place.

DREW V. THE KING, 6 Can. Cr. Cas. 241 (Que.) affirmed.

DREW V. THE KING (No. 2), (Can.) 424

Perjury in affidavit used in civil action—Several charges on one affidavit—Affidavit an entire statement not severable—Postponing perjury trial pending the civil action.

(1) A charge of perjury is defective as not disclosing a crime, if it does not allege that the statement was sworn to knowing the same to be false, or if such is not the necessary inference from what is alleged, apart from the declaration in the charge that the accused "thereby committed wilful and corrupt perjury."

(2) Upon a "speedy trial" upon several charges of perjury in respect of one affidavit, the trial Judge is bound to regard the whole affidavit as the sworn statement in respect of each charge, and should not treat each paragraph of the affidavit as an entire statement independently of the other paragraphs.

(3) *Semble*, where a charge of perjury is brought on for trial during the pendency of the civil action in which it is alleged to have been committed and where the question of fact on which the perjury is alleged is the same as that involved in the civil action, the criminal Court should exercise its discretion to postpone the criminal trial until after judgment in the civil action.

THE KING V. COHON, (N.S.) 386

Indictment for perjury; stating the offence; note.

397

Plea.

Change of plea—Murder—Plea of guilty by one prisoner—Acquittal of other prisoner on plea of not guilty—Guilt of prisoner applying to change plea. inconsistent with verdict acquitting other defendant.

Where two persons are jointly indicted for murder and one pleads guilty and the other not guilty, and the trial upon the latter plea results in an acquittal, leave should be granted the other defendant to change his plea of guilty to one of not guilty, if the circumstances of the case are such that the verdict of acquittal already given in respect of the one would be absolutely inconsistent with the guilt of the other who had pleaded guilty.

THE KING V. HERBERT, (Ont.) 214

When accused must elect for speedy trial.

In order to waive a trial by jury and to elect to be tried by a Judge of Sessions, an information must have been laid before a justice of the peace and a preliminary enquiry had thereon and the accused must have been committed for trial.

If an accused party neglects to take the necessary steps to elect in favour of a "speedy trial" without a jury in the special Court for speedy trials, before he has pleaded to an indictment preferred by leave of the Judge of a jury Court his plea to such indictment will conclude him from electing against a jury trial.

THE KING v. WENER, (Que.) 406

Police magistrate.

See CONVICTION; MAGISTRATE; STATED CASE; SUMMARY TRIAL.

Post office.

Post letter—Detention and search of letter carrier by detective officer—Right of search.

Where a letter carrier violates the rules of the post office department by failing to enter a letter bearing a non-existent address in the book provided for that purpose, or to return the letter to the post office, there is reasonable and probable cause for detaining and searching him, and an action for damages against the peace officer who effected the arrest is not maintainable in the absence of evidence that the officer had made an improper and illegal use of his authority in the manner in which he effected such detention and search. A letter is a post letter although directed to a fictitious or non-existent address.

MAYER v. VAUGHAN (No. 2), (Que.) 68

Preliminary inquiry.

See CONVICTION; INFORMATION.

Privilege.

See CANADA EVIDENCE ACT.

Prize fight.

Boxing exhibition—Sham encounter—Aiding and promoting.

(1) An exhibition of fighting with fists or hands to witness which an admission fee is charged to the public and at which it is announced that the stake money will go to the contestant who knocks out his opponent in a stipulated number of rounds is a "prize fight" within sec. 92 of the Criminal Code.

(2) Such an exhibition made for gain must be viewed as it appeared or was intended to appear to the public, and it is no defence that the participants had merely feigned to fight.

STEELE v. MABER, (Que.) 446

Promoting prize fights—Cr. Code secs. 92-97; note.

450

Railway.

See CONSPIRACY.

Recognizance.

Deposit in lieu of recognizance—Requisites of—Return by justice to appellate Court.

(1) A defendant fined in a summary conviction proceeding who thereupon pays the fine to the clerk of the Court instead of giving a recognizance or applying to the justice under Code sec. 880 (c) to fix the deposit on appeal, loses his right of appeal under secs. 879 and 880, notwithstanding that the magistrate afterwards fixed the amount of deposit for the costs only and such deposit was made and transmitted to the appellate Court with the conviction.

(2) The deposit authorized by Code sec. 880 (c) in lieu of a recognizance on appeal from a summary conviction must include the fine, and the whole sum covering both the fine and the probable costs of appeal must be transmitted to the appellate Court.

(3) Semble, the duty is upon the appellant to obtain the justice's return of such deposit to the appellate Court under Code sec. 888, and unless such return is made the appeal must be quashed.

THE KING v. NEUBERGER, (B.C.) 142

Summary conviction—Joint appeal by several defendants—Two sureties essential.

On a joint appeal, under sec. 879 of the Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellants, and the appeal will be quashed if the recognizance be given with only one surety.

THE QUEEN v. JOSEPH, (Que.) 144

Summary trial—Release on suspended sentence—Information under oath as to breach of recognizance.

Where after a summary trial the accused is convicted but is released on suspended sentence and a recognizance is taken binding the accused to keep the peace and be of good behaviour (Code sec. 971), the magistrate has no jurisdiction to impose sentence without an information under oath charging a breach of the recognizance (Code sec. 973).

THE KING v. SITEMAN, (N.S.) 224

When recognizances should shew jurisdiction; note. 418
Finding sureties to keep the peace. See KEEPING THE PEACE.

Records.

Court of General Sessions—Inspection—Certified record of acquittal—Fiat of Attorney-General unnecessary.

(1) The judgments of the Courts of General Sessions in Ontario are public records, and any person interested therein is entitled,

as of right, to inspect them, and to obtain an exemplification of the record.

(2) A person tried and acquitted in any criminal Court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to compel the delivery of certified copies or an exemplification thereof upon tender of the proper fees.

(3) The English statute, 46 Edw. III., as to the publicity of Court records is in force in Ontario.

ATTORNEY-GENERAL V. SCULLY, (Ont. C.A.) 167

Control by provincial Courts of Court records—Exemplification of proceedings in criminal prosecution—Mandamus to clerk of the peace.

The control exercised by provincial Courts over their own records and their own officers should not, as a general rule, be interfered with by the Supreme Court of Canada on appeal from a provincial Court.

ATTORNEY-GENERAL V. SCULLY, (Can.) 381

Reply.

Right of reply—Counsel representing the Attorney-General—Defence adducing no evidence—Summing up for prosecution.

(1) Where no evidence is offered for the defence, the defendant's counsel has the right to the last address to the jury notwithstanding that the prosecution is conducted by counsel acting for the Attorney-General.

(2) The "right of reply" permitted by Code sec. 661 to the Attorney-General or to counsel acting on his behalf, is the right to again address the jury at the close of the evidence, and before the address of defendant's counsel, when the defence offers no evidence.

THE QUEEN V. LE BLANC, (Man.) 348

Right of reply to Crown counsel; Cr. Code sec. 661; note. 350

Reserved case.

Case reserved on Attorney-General's application—Motion to quash—Placing a prisoner twice in jeopardy.

A case may be reserved at the instance of the Crown upon a question of law as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground.

THE KING V. PHINNEY (No. 1), (N.S.) 469

Reserved case on Crown's application—Discretion to refuse new trial notwithstanding error below.

(1) Where a verdict of not guilty is returned by the Judge's direction after the evidence is heard, and a reserved case is taken

to the Court of Appeal at the instance of the Crown upon the ground that the direction was erroneous and that it was for the jury and not for the Judge to say whether a certain printed advertisement disclosed an unlawful intent, the Court of Appeal may decline to order a new trial although it upholds the objection that such direction was erroneous.

(2) Notwithstanding the power to order a new trial upon a case reserved at the instance of the Crown, the accused should not ordinarily be put in jeopardy a second time for the same offence merely because his acquittal was due to an erroneous direction not resulting in a mis-trial.

(3) Per Osler, J.A.—Where there has been an acquittal, the preferable practice is for the trial Judge to refuse to reserve a case upon the application of the prosecutor complaining of an erroneous direction, and for the prosecutor to apply to the Court of Appeal under Code sec. 744 for leave to appeal.

THE KING v. KARN, (Ont.) 479

Form of remitting the evidence.

The Judge reserving a case for the Court of Appeal as to the sufficiency of the evidence to sustain a conviction should either state the effect of the evidence given or extract the material parts of it, and not send up the whole body of the evidence with a question as to its sufficiency.

THE KING v. COHON, (N.S.) 386

And see APPEAL.

Salvation Army.

Obstruction of highway. See HIGHWAY.

Search.

Of person under arrest—Release by officer without complaint laid.

Where a letter-carrier violates the rules of the post office department by failing to enter a letter bearing a non-existent address in the book provided for that purpose, or to return the letter to the post office, there is reasonable and probable cause for detaining and searching him, and an action for damages against the peace officer who effected the arrest is not maintainable in the absence of evidence that the officer had made an improper and illegal use of his authority in the manner in which he effected such detention and search.

MAYER v. VAUGHAN (No. 2), (Que.) 68

Sentence.

Release on suspended sentence—Procedure to bring offender up for sentence.

(1) Where after a summary trial the accused is convicted but is released on suspended sentence and a recognizance is taken binding the accused to keep the peace and be of good behaviour (Code sec.

971), the magistrate has no jurisdiction to impose sentence without an information under oath charging a breach of the recognizance (Code sec. 973).

(2) Where such release on suspended sentence was in respect of a conviction for keeping a disorderly house, the fact that the accused had again been brought before the same magistrate on a similar charge which however was not substantiated, does not give the magistrate jurisdiction to impose the sentence which had been suspended in respect of the first charge.

(3) *Semble*, a proceeding under sec. 973 to bring up for sentence an accused person who had been released on suspended sentence, can only be taken at the instance of the Crown.

THE KING v. SITEMAN, (N.S.) 224

Release on suspended sentence; Cr. Code sec. 971; note.

226

Sidewalk.

Obstruction of. See HIGHWAY.

Speedy trial.

Preferring different charge—Cr. Code secs. 767, 773.

Notwithstanding the provisions of sec. 773 of the Criminal Code, a Judge should not, against the wish of a prisoner, give his consent, at the trial before him, under the speedy trials clauses without a jury, to any other charge being preferred than that upon which the prisoner was committed for trial, unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial.

THE KING v. CARRIERE, (Man.) 5

Adding new charge—Previous leave of Judge necessary.

(1) When the accused has elected a "speedy trial" under Part LIV. of the Code upon charges in respect of which he has been bound over to answer an indictment, a new charge cannot be added in the County Court Judge's Criminal Court without the leave of the Judge, although founded upon the same depositions.

(2) The consent of the Judge under the Speedy Trial Clauses to prefer another charge against the accused must be obtained before the charge is preferred.

(3) Upon a "speedy trial" upon several charges of perjury in respect of one affidavit, the trial Judge is bound to regard the whole affidavit as the sworn statement in respect of each charge, and should not treat each paragraph of the affidavit as an entire statement independently of the other paragraphs.

THE KING v. COHON, (N.S.) 386

Option for speedy trial—In what cases it can be exercised—When accused must elect—Adding or substituting another charge.

(1) In order to waive a trial by jury and to elect to be tried by a Judge of Sessions, an information must have been laid before a justice of the peace and a preliminary enquiry had thereon and the accused must have been committed for trial.

(2) If an accused party neglects to take the necessary steps to elect in favour of a "speedy trial" without a jury in the special Court for speedy trials, before he has pleaded to an indictment preferred by leave of the Judge of a jury Court his plea to such indictment will conclude him from electing against a jury trial.

(3) The charge which may be added or substituted with the Judge's consent at a "speedy trial" under Code sec. 773, must be cognate to the one for which the accused was committed or bailed, and it is not permissible to add or substitute a charge wholly disconnected therewith. *THE KING v. WENER*, (Que.) 406

Electing trial without a jury—Actual custody a pre-requisite—Effect of return of true bill by Grand Jury—Exclusive jurisdiction of jury Court.

(1) An accused person who has been committed for trial at the preliminary inquiry, or who has been bailed under Code sec. 601 to appear for trial, has no right to elect a speedy trial without a jury unless he is in actual custody at the time of electing.

(2) The surrender and election in favour of speedy trial of a person who, at the preliminary inquiry, was bailed to appear for trial, must take place before a true bill has been found by the Grand Jury and filed of record in the jury Court, and unless so made the jury Court will have exclusive jurisdiction.

(3) Sub-section 5 of Code sec. 767 confers the right to re-elect in favour of a speedy trial, notwithstanding a pending indictment, only in case the accused has been arraigned under the speedy trials procedure, and has thereupon elected against a speedy trial.

THE KING v. KOMIENSKY (No. 1), (Que.) 524

Stated case.

Application to magistrate after unsuccessful appeal from summary conviction—*Res judicata*.

(1) Where an appeal has been taken to a County Court under Cr. Code sec. 879 from a summary conviction and the County Court has affirmed the conviction, it is not open to the accused to afterwards have the convicting magistrate refer a "stated case" to a superior Court.

(2) The decision of the County Court being *res adjudicata* between the parties is a bar to the application for a "stated case."

THE KING v. TOWNSHEND (No. 2), (N.S.) 519

Summary conviction; review by stated case or appeal; option; note.	523
Practice under Ontario Provincial laws.	547

Statutes

Alien Labour Act (Can.),	357
Automobiles, Ontario Act of 1903, respecting,	549
Cattle Brand Act, 1903, Manitoba,	538
Cattle Brand Ordinance, N.W.T. 1903 amendment,	545
C.C.P. (Que.) art. 833,	223
C.S.L.C., ch. 95,	147
Canada Evidence Act,	323
Canada Stat., 1897, 60-61 Vict. ch. 11,	357
Canada Stat., 1897, 60-61 Vict. ch. 19,	29
Canada Stat., 1898, ch. 27,	29
Canada Stat. (1901), 1 Edw. VII., ch. 13,	357
Canada Stat. (1901), 1 Edw. VII., ch. 27,	159
Canada Stat. (1902), 2 Edw. VII., ch. 19,	351
Canada Temperance Act,	54, 204, 219
Election Act (Ont.),	452
English Stat., 46 Edw. III.,	167
Fisheries Act (Can.),	308
Foreign Companies Ordinance, 1903, N.W.T.,	543
Fruit Marks Act (Can.),	159
Habeas Corpus Act (Que.),	147
Indian Act (Can.),	156
Industrial Schools, Act of 1903 respecting,	531
Inland Revenue Act (Can.),	1, 29
Jurors Act, 3 Edw. VII., ch. 28 (Que.),	546
Juvenile Offenders, 1903 amendment, Nova Scotia,	542
Liquor Act, 1902 (Ont.),	452
Liquor License Act (N.S.),	493
Manitoba Grain Act, 1900 (Can.),	351
Master and Servant Act (Ont.),	499
Motor Vehicles Act, 1903 (Ont.),	549
North-West Territories Amendment Act, 1903,	531
N.W.T. Ordinance, 1900, ch. 32,	23, 88, 94, 117
N.W.T. Ordinance, 1901, ch. 33,	94
Nova Scotia Acts, 1897, ch. 32,	100
Ontario Loan Corporations Act, amendments of 1900 and 1903,	552
Ontario Stat., 1 Edw. VII., ch. 12,	499
Ontario Stat., 1 Edw. VII., ch. 13,	499
Ontario Stat., 2 Edw. VII., ch. 10,	514
Ontario Stat., 2 Edw. VII., ch. 12,	499
Ontario Stat., 2 Edw. VII., ch. 33,	452
Ontario Summary Convictions Act, amendments of 1901 and 1903,	546
Prisons, public and reformatory, 3 Edw. VII., ch. 51,	531

Quebec Act, The, 14 Geo. III. (Imp.), ch. 83,	314
Railway Act, 1903 (Can.),	532
Reformatory Prisons, 1903 amendment,	531
R.S.B.C., 1897, ch. 144,	227
R.S.C., 1886, ch. 34,	1, 29
R.S.C., 1886, ch. 96,	308
R.S.C., 1886, ch. 152,	39
R.S.N.S., 1900, ch. 100,	493
R.S.O., 1897, ch. 88,	15
R.S.O., 1897, ch. 90,	514
R.S. Que., art. 2657 d,	546
R.S. Que., art. 2946,	39
R.S. Que., art. 2964,	39
Towns Incorporation Act (N.S.),	282

Stealing.

See THEFT.

Summary conviction.

See CONVICTION.

Summary trial.

Keeping bawdy house—Consent irregularly obtained—Omission of magistrate to state option of jury trial.

(1) After the accused consents to summary trial before a magistrate under Code sec. 786, it is not necessary for the magistrate to again "reduce the charge to writing" if that had been done before the consent was given, and it is sufficient for the magistrate to read to the accused the charge already written.

(2) A consent to "summary trial" under Code sec. 786 given to the magistrate without the option of a jury trial being expressly stated to the accused, is invalid and a prisoner held upon a conviction based upon such consent must be discharged upon habeas corpus.

THE KING v. SHEPHERD, (N.S.) 463

Sunday observance.

Montreal city by-law as to petty trading—Sale of cigars and confectionery.

Montreal City By-law, No. 281, permitting the sale on Sunday of "fruits, cigars, confectionery and temperance beverages" by all persons who sell all these things and are not engaged in trade is invalid as arbitrary and unjust because it does not authorize the sale of tobacco as well as cigars, and because it does not extend to all persons who are engaged in the same business.

CITY OF MONTREAL v. FORTIER, (Que.) 340

Sureties.

See BAIL; ESTREAT; KEEPING THE PEACE.

Suspended sentence.

See SENTENCE.

Theft.

Recent possession—Presumption—Rebuttal—Reasonable account of possession.

Where a person charged with a theft has at the time of the finding of the goods in his possession given a reasonable account of the manner in which he became possessed of them, the presumption arising from his recent possession is rebutted, but semble, the same result does not of necessity follow from a like statement first made by the accused in his evidence given on his own behalf at the trial.

THE QUEEN v. MCKAY, (N.S.) 151

Summary trial—Theft over \$10—Plea of not guilty—Jurisdiction of city stipendiary magistrate.

On a charge of theft where the value exceeds \$10 and the accused consents to a summary trial before a city stipendiary magistrate, such magistrate is not bound to remand him under Code sec. 790, upon his pleading "not guilty," but has a jurisdiction, apart from sec. 790, conferred by Code sec. 785, under which he may try the charge and impose the same punishment as might be imposed by a Court of General Sessions in Ontario.

THE KING v. BOWERS (No. 2), (N.S.) 264

Theft under \$10—Summary trial—Trial before town police magistrate—Limit of punishment.

(1) The punishment upon summary trial for the theft of property not exceeding \$10 in value (and not being the offence of stealing from the person) is governed by Code sec. 783 and 787 and is therefore limited to six months imprisonment.

(2) In view of the marginal note to Code sec. 785, i.e., "summary trial in certain other cases," sec. 785 should be considered as applying only to cases not specifically mentioned in sec. 783.

(3) Where the imprisonment directed by a warrant of commitment is in excess of that authorized by law, and the partial imprisonment actually served thereunder is of a different class to that specified in the warrant, the Court on habeas corpus should not order further detention under sec. 752 although the accused had pleaded guilty to the charge.

THE KING v. HAYWARD, (Ont.) 399

Giving a reasonable account of possession; note. 153

Summary trials for theft; note. 266

Summary trial for theft; Cr. Code secs. 783, 785, 787; note. 401

Trial.

Abortive trials—Costs of.

In British Columbia, following the practice there in civil cases, the costs of taking evidence under commission abroad on behalf of the

defendant in a prosecution for criminal libel cannot be taxed against the prosecutor unless such evidence was used at the trial; and the costs of abortive trials of an indictment for criminal libel cannot be taxed under Cr. Code secs. 833 and 835, against the party who ultimately fails in the litigation.

THE KING v. NICHOL, (B.C.) 8

Place of trial—Witness in same country too ill to attend—Removal of Court and jury to his residence.

(1) At the trial of an indictable offence, the presiding Judge may with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom, and may order that the Court and jury proceed there for that purpose.

(2) The prisoner is bound by the consent of his counsel in such a matter which does not go to the jurisdiction of the Court.

THE KING v. ROGERS, (N.B.) 419

See APPEAL; CONVICTION; COSTS; INDICTMENT; JURY; SPEEDY TRIAL; SUMMARY TRIAL.

Uncertainty.

See CONVICTION.

Vagrancy.

Insulting language—Impeding or incommoding passengers.

Slandering a person in a restaurant open to the public is not an offence under sec. 207 of the Criminal Code, either as an obstruction to passenger by using insulting language, or as a disturbance incommoding passengers. A restaurant open to the public is not a "public place" within the meaning of Code sec. 207.

THE KING v. MERCIER, (Que.) 44

Assembly in public street—Persons of general good character—Cr. Code sec. 207.

The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction. Cr. Code sec. 207 does not apply to persons of general good character, but is intended to apply to loose, idle and disorderly persons only.

THE KING v. KNEELAND, (Que.) 81

Non-support of wife. See HUSBAND AND WIFE.

Disorderly house. See DISORDERLY HOUSE.

Warrant.

Of arrest. See ARREST.

Of commitment. See COMMITMENT.

Witness.

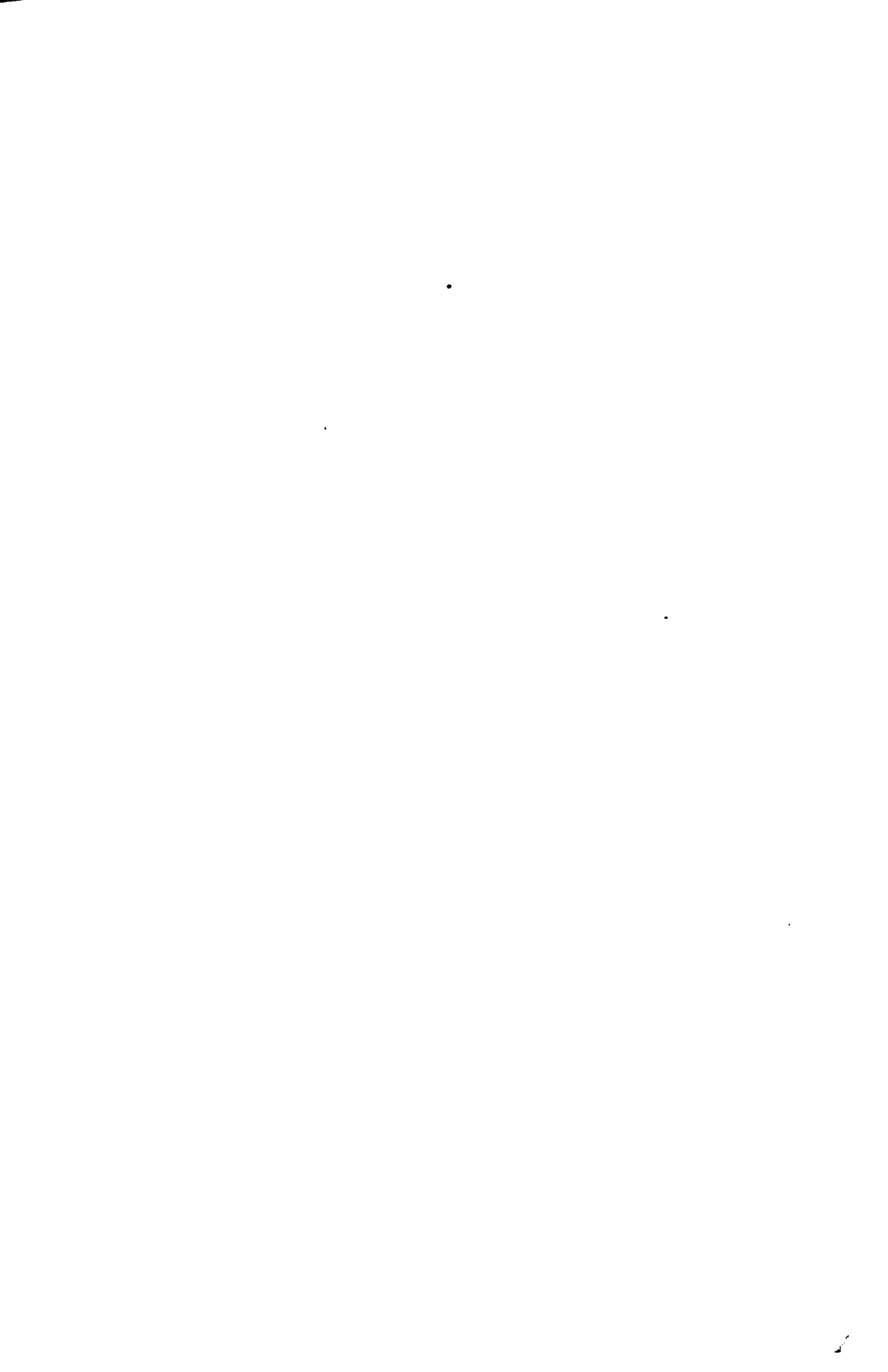
Witness fees—Statute fixing per diem rate—Fine for non-attendance where fee not prepaid.

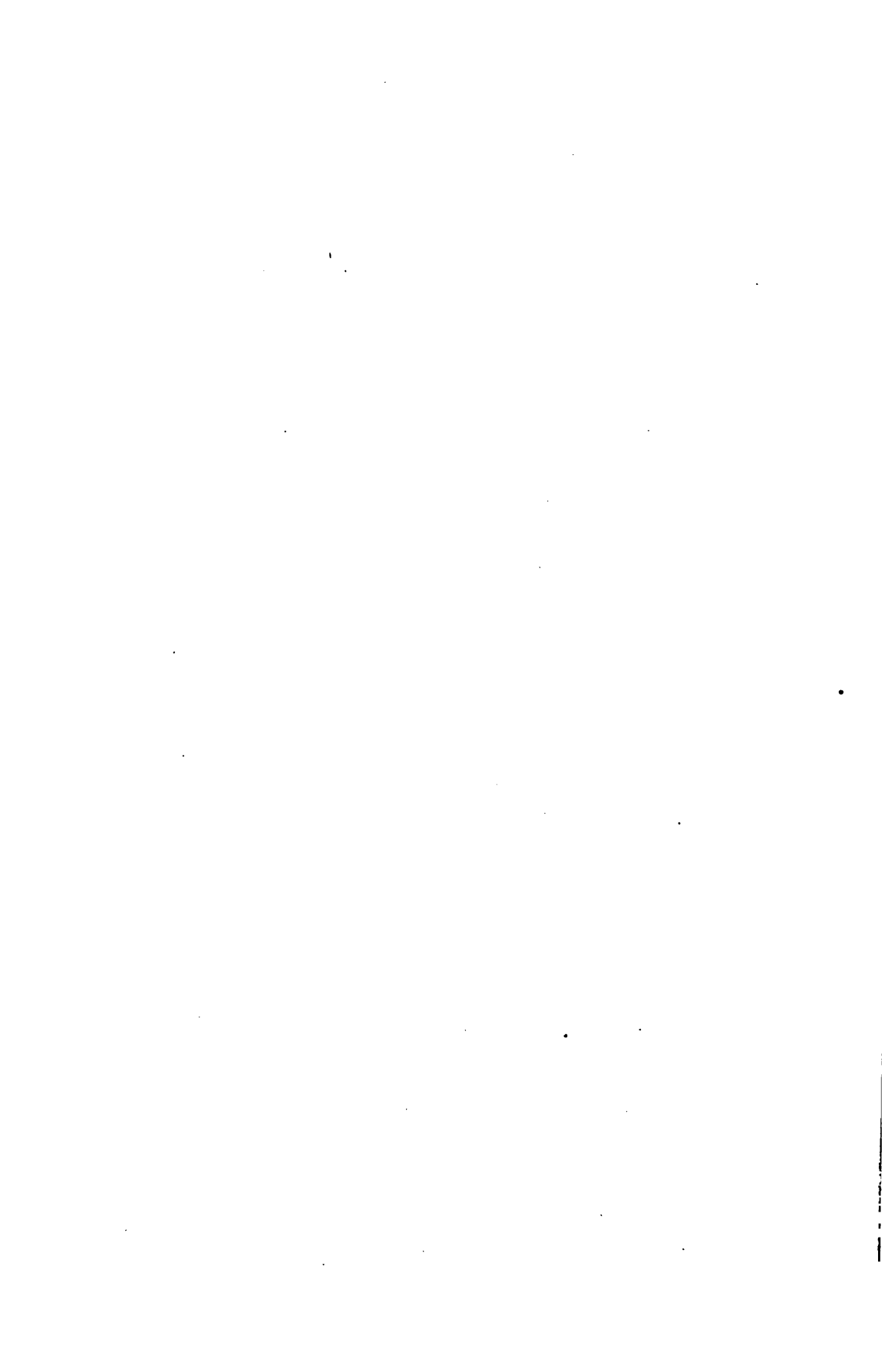
A witness subpoenaed to attend before justices under a provincial law which specifies a per diem witness fee but makes no provision as to the time or manner of payment, is not liable to fine for refusing or neglecting to attend under the subpoena unless he had been prepaid his witness fee. **THE KING v. CHISHOLM, (N.S.) 493**

And see **CANADA EVIDENCE ACT; EVIDENCE.**

Words and phrases.

"Aliens or foreigners."	357
"Bawdy house."	42, 463
"Communication."	323
"Conduct the trial."	452
"Faced surface."	159
"Full opportunity to cross-examine."	124, 129
"In any place."	29
"Knowingly assisting."	357
"Place."	29
"Prize fight."	446
"Public place."	44
"Right of reply."	348
"Trap net."	308
"Valuable security."	113
"Wilful refusal or neglect."	165





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